Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA, Complainant, v. FLORIDA POWER AND LIGHT COMPANY, Defendant.	Proceeding No. 19-187 Bureau ID No. EB-19-MD-006

REPLY LEGAL ANALYSIS IN SUPPORT OF POLE ATTACHMENT COMPLAINT

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA

By Counsel:

Robert Vitanza
Gary Phillips
David Lawson
AT&T SERVICES, INC.
1120 20th Street, NW, Suite 1000
Washington, DC 20036
(214) 757-3357

Christopher S. Huther
Claire J. Evans
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
(202) 719-7000
chuther@wileyrein.com
cevans@wileyrein.com

Date: November 6, 2019

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY 1

II. LEGAL ANALYSIS 3

A. FPL's Position Is In Direct Conflict With The Commission's Goals. 3

B. FPL Cannot Avoid The New Telecom Rate Presumption. 6

1. The Commission Already Rejected FPL's Meritless Retroactivity, Takings, And Due Process Arguments. 7

2. The New Telecom Rate Presumption Applies To The JUA. 11

C. The New Telecom Rate Is The Just And Reasonable Rate Because FPL Did Not Rebut The Presumption With Clear And Convincing Evidence. 16

1. FPL's Case Rests On Foundational Legal Errors. 16

2. FPL's 18 Alleged Benefits Are Redundant And Replete With Flaws. 21

3. AT&T's "Voluntary" Pole Access Cannot Support A Higher Rate. 40

D. FPL Cannot Lawfully Charge The JUA Rates Under The 2011 *Pole Attachment Order* Either. 41

1. Existing JUAs Are Subject To Challenge Under The 2011 *Order*. 42

2. FPL's Answer Evidences Its Use Of Its Pole Ownership Advantage To Impose Unjust And Unreasonable Rates. 43

3. FPL's Other Efforts To Justify Its Rates Under The 2011 *Order* Fail. 48

E. AT&T Should Be Awarded A Properly Calculated Per-Pole New Telecom Rate Effective As Of The 2014 Rental Year. 52

1. FPL's Rate Calculations Are Unlawfully Inflated. 52

2. The Applicable Statute Of Limitations In This Case Is 5 Years. 58

F. FPL's Other Attempts To Avoid Or Delay Rate Reductions Fail. 60

1. AT&T Repeatedly And In Good Faith Tried To Settle This Dispute. 60

2. AT&T Did Not Engage In Any Unlawful "Self-Help," But Paid FPL's Invoices In Full And At The Time FPL Demanded. 64

3. FPL's Affirmative Defenses Lack Merit. 66

III. CONCLUSION 74

INFORMATION DESIGNATION 76

RULE 1.721(M) VERIFICATION 77

CERTIFICATE OF SERVICE 78

* Certain information in this Reply Legal Analysis has been designated confidential pursuant to 47 C.F.R. § 1.731. The designated information is marked with a text box in the confidential version of these pleadings and is redacted in the public version.

TABLE OF AUTHORITIES

Cases **Page(s)**

Alabama Power Co. v. FCC,
311 F.3d 1357 (11th Cir. 2002) 23

American Electric Power Service Corp. v. FCC,
No. 11-1146, 2012 WL 1187988 (D.C. Cir. Apr. 9, 2012).....13

American Electric Power Service Corp. v. FCC,
708 F.3d 183 (D.C. Cir. 2013).....71, 73

Cordones v. Brevard County,
781 So. 2d 519 (Fla. Dist. Ct. App. 2001) 36

Director, Office of Workers' Compensation Programs, Department of Labor v. Greenwich Collieries, 512 U.S. 267 (1994).....70

FCC v. Florida Power Corp.,
480 U.S. 245 (1987).....14, 41, 53

FTC v. Morton Salt Co.,
334 U.S. 37 (1948).....69

Georgia Power Co. v. Teleport Communications Atlanta, Inc.,
346 F.3d 1033 (11th Cir. 2003) 9, 10

Gulf Power Co. v. United States,
187 F.3d 1324 (11th Cir. 1999) 41

Hoang v. Bank of America, N.A.,
910 F.3d 1096 (9th Cir. 2018) 59, 60

Level 3 Communications, LLC v. Telephone Operating Co. of Vermont, LLC,
No. 5:11-CV-280, 2011 WL 6291959 (D. Vt. Dec. 15, 2011).....66

Line Systems, Inc. v. Sprint Nextel Corp.,
No. 11-6527, 2012 WL 3024015 (E.D. Pa. July 24, 2012) 66

Monongahela Power Co. v. FCC,
655 F.2d 1254 (D.C. Cir. 1981).....9

National Communications Ass'n, Inc. v. American Telephone & Telegraph Co.,
No. 93 CIV. 3707(LAP), 2001 WL 99856 (S.D.N.Y. Feb. 5, 2001).....66

Rio Grande Family Radio Fellowship, Inc. v. FCC,
406 F.2d 664 (D.C. Cir. 1968).....68

Schaffer ex rel. Schaffer v. Weast,
546 U.S. 49 (2005).....70

Southern Co. Services, Inc. v. FCC,
313 F.3d 574 (D.C. Cir. 2002).....70, 71

Spiegler v. District of Columbia,
866 F.2d 461 (D.C. Cir. 1989).....59

United States v. Taylor,
686 F.3d 182 (3d Cir. 2012).....69

Administrative Decisions

In the Matter of Accelerating Wireline Broadband Deployment,
Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (2018) ..... *passim*

Air Touch Cellular v. Pacific Bell,
16 FCC Rcd 13502 (2001).....72

Alabama Cable Telecommunications Ass'n v. Alabama Power Co.,
16 FCC Rcd 12209 (2001).....28, 40, 70

All American Telephone Co. v. AT&T Corp.,
26 FCC Rcd 723 (2011).....66

In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments, Consolidated Partial Order on Reconsideration,
16 FCC Rcd 12103 (2001)..... *passim*

In the Matter of Amendment of Rules & Policies Governing the Attachment of Cable Television Hardware to Utilites Poles, 2 FCC Rcd 4387 (1987).....54, 70

Amendment of the Rules and Policies Governing Pole Attachments,
Report and Order, 15 FCC Rcd 6453 (2000).....54

American Cellular Corp. & Dobson Cellular Systems, Inc. v. BellSouth Telecommunications, Inc., 22 FCC Rcd 1083 (2007).....59

In the Matter of American Telephone & Telegraph Co.,
8 FCC Rcd 1767 (1993).....70

In re Applications of John D. Bomberger,
7 FCC Rcd 1849 (1992).....29

In re Applications of Priscilla L. Schwier,
4 FCC Rcd 2659 (1989).....16

In re Applications of Shaw Communications, Inc.,
27 FCC Rcd 6995 (2012) 69

AT&T Services Inc. v. Great Lakes Comet, Inc.,
30 FCC Rcd 2586 (2015) 67, 72

Cable Television Ass'n of Georgia v. Georgia Power Co.,
18 FCC Rcd 16333 (2003) 49

Cavalier Telephone, LLC v. Virginia Electric & Power Co.,
15 FCC Rcd 9563 (2000) 36, 74

Cavalier Telephone, LLC v. Virginia Electric & Power Co.,
17 FCC Rcd 24414 (2002) 36

In the Matter of Communique Telecommunications, Inc.,
10 FCC Rcd 10399 (1995) 66

In the Matter of Connect America Fund,
26 FCC Rcd 17663 (2011) 3

Florida Cable Telecommunications Ass'n v. Gulf Power Co.,
18 FCC Rcd 9599 (2003) 49

Heritage Cablevision Associates of Dallas, L.P. v. Texas Utilities Electric Co.,
6 FCC Rcd 7099 (1991) 10

In the Matter of Implementation of Section 224 of the Act,
26 FCC Rcd 5240 (2011) ..... *passim*

In the Matter of Implementation of Section 224 of the Act,
25 FCC Rcd 11864 (2010) ..... *passim*

In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, 13 FCC Rcd 6777 (1998) 57

In the Matter of Improving Public Safety Communications in the 800 Mhz Band,
26 FCC Rcd 1058 (2011) 66

In the Matter of Investigation of Special Access Tariffs of Local Exchange Carriers, 2 FCC Rcd 3507 (1987) 35

Michael J. Valenti v. American Telephone and Telegraph Co.,
No. FCC 97-26, 1997 WL 818519 (OHMSV Feb. 26, 1997) 59

Knology, Inc. v. Georgia Power Co.,
18 FCC Rcd 24615 (2003) 29, 50

Marcus Cable Associates, LP v. Texas Utilities Electric Co.,
18 FCC Rcd 15932 (2003) 50

Marzec v. Power,
15 FCC Rcd 4475 (2000) 67

In the Matter of MCI Telecommunications Corp.,
Memorandum Opinion and Order, 62 FCC 2d 703 (1976) 66

MGC Commuications, Inc. v. AT&T Corp.,
14 FCC Rcd 11647 (1999) 66

Multimedia Cablevision, Inc. v. Southwestern Bell Telephone Co.,
11 FCC Rcd 11202 (1996) 49, 56

Municipality of Anchorage d/b/a Anchorage Telephone Utility v. Alascom, Inc.,
4 FCC Rcd 2472 (1989) 59

Nevada State Cable Television Ass'n v. Nevada Bell,
13 FCC Rcd 16774 (1998) 55

Qwest Commuications Co. v. Sancom, Inc.,
28 FCC Rcd 1982 (2013) 67, 72

In the Matter of Results Broad. Rhinelander, Inc. Petition for Waiver of Final Payment Deadline for Winning Bids in Auction 94,
No. DA19-1002, 2019 WL 4942573 (Oct. 3, 2019) 68, 69

In Re Rust Craft Broad. Co., Steubenville, Ohio, Petition for Reconsideration,
68 FCC 2d 1013, 1016 (1978) 33

Selkirk Communications, Inc. v. Florida Power & Light Co.,
8 FCC Rcd 387 (1993) 42, 50

Teleport Communications Atlanta, Inc. v. Georgia Power Co.,
16 FCC Rcd 20238 (Deputy Chief, Cable Services Bur. 2001) 9

Television Cable Service, Inc. v. Monongahela Power Co.,
88 FCC 2d 63 (1981) 26

Time Warner Entertainment v. Florida Power & Light Co.,
14 FCC Rcd 9149 (Chief, Cable Service Bur. 1999) 10, 50, 58

Verizon Florida LLC v. Florida Power & Light Co.,
30 FCC Rcd 1140 (EB 2015) ..... *passim*

Verizon Virginia, LLC v. Virginia Electric & Power Co.,
32 FCC Rcd 3750 (EB 2017) ..... *passim*

Statutes

47 U.S.C. § 160 68

47 U.S.C. § 224 ..... *passim*

47 U.S.C. § 415 ..... 58, 59

Fla. Stat. § 95.11 ..... 58, 60

Regulations

18 C.F.R. Pt. 101 ..... 25, 39

47 C.F.R. § 1.3 68

47 C.F.R. §§ 1.53-1.59 68

47 C.F.R. § 1.722 60

47 C.F.R. § 1.726 13

47 C.F.R. § 1.1404 ..... *passim*

47 C.F.R. § 1.1407 ..... 9, 52, 58, 73

47 C.F.R. § 1.1409 ..... 23, 25, 27

47 C.F.R. § 1.1410 ..... 26, 27

47 C.F.R. § 1.1413 ..... *passim*

84 Fed. Reg. 2460-01 (Feb. 7, 2019) 72

Legistative Materials

S. Rep. No. 95-580 (1977) 41, 53

I. INTRODUCTION AND SUMMARY

FPL's pleadings confirm that the Commission should apply its new telecom rate presumption and force a reduction of FPL's unlawfully high rental rates. FPL continues to reject the Commission's authority over ILEC rates, an issue settled over 8 years ago.[1] It argues that the age of the parties' Joint Use Agreement ("JUA") should place it beyond the reach of federal law, but that age does not make the JUA immune from technological and competitive developments or from the changes to the pole attachment regime that Congress and the Commission enacted to promote deployment of the advanced services needed today and in the future. And FPL challenges the Commission's new telecom rate presumption itself—arguing that it can never apply to existing attachments made to existing poles under existing agreements. But the Commission rejected these arguments when it sought to promote broadband deployment by eliminating the "outdated rate disparities" that persist under existing agreements, like the parties' 1975 JUA.[2] The Commission should promptly enforce its new telecom rate presumption in this case.

FPL tries to hide the rates it has charged AT&T's competitors, which cannot be found in FPL's Answer. But it admitted in response to AT&T's interrogatories that it has been charging AT&T rental rates that are up to [redacted] *times* the rates FPL charged AT&T's competitors for use of wood distribution poles, up to [redacted] *times* the rates FPL charged AT&T's competitors for use of concrete distribution poles, and [redacted] *times* the rates FPL charged AT&T's competitors for use of

[1] *See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future,* Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) ("*Pole Attachment Order*"), *aff'd*, *Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 940 (2013).

[2] *In the Matter of Accelerating Wireline Broadband Deployment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (2018) ("*Third Report and Order*").

transmission poles. FPL does not come close to rebutting the Commission's presumption that AT&T should be charged a new telecom rate like its competitors, let alone provide clear and convincing evidence that AT&T receives net material benefits under the JUA that advantage AT&T over its competitors. Instead, FPL offers conflicting factual claims riddled with error, hypotheticals that are not grounded in reality or supported by actual data, and its own stated belief that AT&T should pay the JUA rates until AT&T removes its facilities from more than 425,000 poles regardless of Commission rulings. Indeed, FPL did not provide a single license agreement as purported "evidence" of AT&T's competitive advantages or a single invoice or payment record showing it collected some cost from AT&T's competitors that was not also paid for by AT&T.

Lacking any legal or factual basis for its exceptionally high pole attachment rates, FPL tries to sow confusion, obscure the facts, accuse AT&T of misconduct, and skirt settled precedent. But all its machinations and revisionist history cannot conceal that FPL is trying to turn back the clock on the Commission's deployment and competition initiatives. For nearly a decade, the Commission has worked to "establish rental rates for pole attachments that are as low and close to uniform as possible … to promote broadband deployment."[3] FPL argues that AT&T should instead pay many multiples of the rates paid by its competitors, amounting to a more than [redacted] million annual impact. FPL defends this extraordinary premium with dubious attempts to quantify the difference between a hypothetical world in which FPL shares poles with communications attachers and one in which it does not. But this argument is 100% contrary to the Commission's objectives and the principle of competitive neutrality that has motivated its rate reforms. The shared use of FPL's utility poles does not differentiate AT&T from its

[3] National Broadband Plan at 110 (2010).

competitors or detract in any way from the fundamental principle that a properly calculated new telecom rate will "fully compensate [FPL] for costs caused by third-party attachments," including AT&T's.[4]

The Commission should soundly reject FPL's arguments, enforce its new telecom rate presumption, and refund the excess amounts FPL has unlawfully collected since 2014. In so doing, the Commission will take a valuable step forward in its decade-long effort to promote deployment through competitively neutral rates.

II. LEGAL ANALYSIS

A. FPL's Position Is In Direct Conflict With The Commission's Goals.

The Commission has worked for nearly a decade to harmonize pole attachment rates at the fully compensatory new telecom level in order to promote competitive neutrality and accelerate deployment of broadband and other advanced services that are "crucial to our nation's economic growth, global competitiveness, and civic life."[5] FPL seeks the exact opposite. Stuck in the 1970s, FPL argues that AT&T should forever pay many multiples of the rates AT&T's competitors pay to use comparable space on FPL's existing utility poles *and* that AT&T should

[4] *Pole Attachment Order*, 26 FCC Rcd at 5324 (¶ 191).

[5] *In the Matter of Connect America Fund*, 26 FCC Rcd 17663, 17667 (¶ 3) (2011); *see also, e.g.*, *Third Report and Order*, 33 FCC Rcd at 7768 (¶ 123); *Pole Attachment Order*, 26 FCC Rcd at 5241 (¶ 1) ("Th[is] Order is designed to promote competition and increase the availability of robust, affordable telecommunications and advanced services to consumers throughout the nation."); National Broadband Plan at 110 ("To support the goal of broadband deployment, rates for pole attachments should be as low and as close to uniform as possible.").

pay exponentially more than its competitors to deploy facilities in the future.[6] FPL's two-pronged attack on the Commission's authority and objectives should be soundly rejected.

FPL first seeks to forever preserve the unjust and unreasonable rates it charges AT&T on the existing joint use network.[7] And the competitive disparity is stark. For comparable space on FPL's poles, FPL charges AT&T's competitors rates that, while themselves unlawfully inflated,[8] are still a mere fraction of the rates FPL charges AT&T:[9]

	2014[10]	2015	2016	2017	2018
Wood Distribution Poles					
New telecom rate FPL charged	$10.44	$11.54	$12.94	$14.84	$16.85
Cable rate FPL charged	$10.46	$11.57	$12.97	$14.88	$16.89
Rate FPL charged AT&T	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Concrete Distribution Poles					
New telecom rate FPL charged	$10.44	$11.54	$12.94	$14.84	$16.85
Cable rate FPL charged	$10.46	$11.57	$12.97	$14.88	$16.89
Effective rate FPL charged AT&T	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Transmission Poles					
New telecom rate FPL charged	$68.06	$76.34	$84.22	$104.60	$103.43
Cable rate FPL charged	$39.70	$33.32	$36.75	$45.65	$45.14
Effective rate FPL charged AT&T	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

[6] *See, e.g.*, FPL's Resp. to AT&T's Interrog. No. 1 (rates charged AT&T), No. 5 (rates charged AT&T's competitors); Answer ¶ 27 ("FPL admits that it has restricted AT&T's right to access FPL's poles and terminated the parties' 1975 JUA ….").

[7] *See, e.g.*, Answer ¶ 4 ("[T]he Commission has no statutory authority to regulate the rates, terms, and conditions of incumbent local exchange carrier pole attachments.").

[8] *See* Section II.E.1, below; *see also* Reply Ex. A at ATT00915-16, 18 (Rhinehart Reply Aff. ¶¶ 7, 11).

[9] *See* FPL's Resp. to AT&T's Interrog. No. 5.

[10] This table compares the per-pole rates that FPL charged AT&T to the per-pole rates FPL charged AT&T's competitors based on the preceding year's cost data, using 1 foot as the space-occupied input to the Commission's rate formula. *See id.*

But FPL does not just seek to preserve these unreasonably high rental rates in perpetuity. It also seeks to exacerbate the competitive disparity by exponentially increasing AT&T's deployment costs. Faced with a request for "just and reasonable" rates, FPL refused to disclose its new telecom rates—let alone negotiate just and reasonable rates or even make an offer[11]—and terminated the parties' JUA so that AT&T can no longer deploy on new FPL pole lines.[12] And because AT&T did not drop its request for "just and reasonable" rates, FPL now demands that AT&T "remove AT&T's equipment from FPL's infrastructure."[13]

Even FPL admits that its threat to remove AT&T's existing facilities has no legal basis,[14] yet it continues to threaten that major disruption to AT&T and its customers.[15] FPL also continues to press forward with its termination of AT&T's ability to deploy on new FPL pole lines[16]—which itself significantly increases costs and negatively impacts deployment.[17] "Florida is a fast-growing state," as FPL explains, and it requires rapid deployment of broadband and

---

[11] *See, e.g.*, Compl. Ex. B at ATT00058 (Miller Aff. ¶ 22); *see also* FPL's Br. in Support of Its Answer ("FPL Br.") at 19 ("FPL also emphasized to AT&T several times that FPL was unwilling to negotiate a new rate going forward.").

[12] AT&T's Am. Pole Attachment Compl. ("Compl.") Ex. 23 at ATT00250 (Notice of Termination (Mar. 25, 2019)); *see also* Compl. Ex. 1 at ATT00128 (JUA, Art. XVI).

[13] Answer ¶ 17.

[14] *Id.* ¶ 12 ("FPL lacks the contractual ability to terminate AT&T's license with respect to any existing joint use poles ….").

[15] *Id.* ¶ 17.

[16] *See* Compl. Ex. 1 at ATT00128 (JUA, Art. XVI).

[17] *See* Reply Ex. C at ATT00976-77 (Peters Reply Aff. ¶ 28) (stating that FPL's termination of the "further granting of joint use" will increase AT&T's deployment costs); *see also, e.g.*, *Pole Attachment Order*, 2011 FCC Rcd at 5242 (¶ 4) ("[E]nvironmental and zoning restrictions and the very significant costs of erecting a separate pole network or entrenching cable underground" often leave "'no practical alternative [for network deployment] except to utilize available space on existing poles.'") (citation omitted).

other advanced services.[18] Instead of promoting that deployment—or at least offering to negotiate a new agreement to allow future deployment on new FPL pole lines—FPL insists that termination is required as part of "collection efforts" of outstanding, and disputed, rental payments.[19] But there is nothing to collect: more than four months ago, "AT&T delivered payment to FPL in the form of two checks totaling [redacted], which represented the outstanding principal balance."[20]

FPL's actions are evidence of some of the most extreme forms of intransigence and resistance to the competition and deployment objectives that prompted the Commission to take further action in 2018 to accelerate the rate relief that ILECs should have received in 2011.[21] The Commission should promptly enforce its new telecom rate presumption, find that FPL has not rebutted the presumption with clear and convincing evidence that AT&T enjoys a net material advantage over its competitors, and provide AT&T the competitively neutral new telecom rate and refunds that are essential to achieving the Commission's goals.

B. FPL Cannot Avoid The New Telecom Rate Presumption.

FPL tries to escape the new telecom rate presumption with specious arguments that conflict with Commission precedent and that, if accepted, would render the presumption incapable of eliminating the "outdated rate disparities" it was adopted to correct.

[18] Answer Ex. A at FPL00005 (Kennedy Decl. ¶ 9).

[19] *See, e.g.*, FPL Br. at 19; Answer ¶ 17.

[20] FPL Br. at 13.

[21] *Third Report and Order*, 33 FCC Rcd at 7767-68 (¶ 123).

1. The Commission Already Rejected FPL's Meritless Retroactivity, Takings, And Due Process Arguments.

FPL argues that the new telecom rate presumption cannot apply to an existing agreement like the JUA because it would be unlawfully retroactive and would raise due process concerns.[22] The Commission rejected FPL's arguments the last time FPL presented them, and they remain meritless this time around.[23]

First, FPL argues that the Commission cannot lawfully apply a "just and reasonable" rate to a JUA that pre-dates the 2011 *Pole Attachment Order* because FPL purportedly invested in a pole network that is "taller and stronger than FPL needed and would have built for itself."[24] There is no need to reconsider this already rejected argument.[25]

Second, FPL argues that the Commission cannot lawfully apply the new telecom rate presumption to a JUA that pre-dates the 2018 *Third Report and Order*.[26] This argument also fails. There is no problem with unlawful "primary" retroactivity because the presumption applies only where a JUA was "entered into, renewed, or in evergreen status *after the effective date of [the 2018] Order*."[27] And there is no problem with unlawful "secondary" retroactivity because the use of a rebuttable presumption to ensure "just and reasonable" rates cannot be

---

[22] *See* FPL Br. at 24-33.

[23] *See Verizon Fla. v. Fla. Power & Light Co.*, Memorandum Op. & Order, 30 FCC Rcd 1140,1145-47 (¶¶ 17-19) (EB 2015) ("*FPL Order*"). *Compare* FPL Br. at 22-23 *with* Public Version of FPL's Resp. to Verizon Florida's Compl., File No. EB-14-MD-003, at 10-20 (Apr. 4, 2014).

[24] FPL Br. at 25; *see generally id.* at 24-32, 35 n.124. The factual basis for this claim is also meritless. *See* Section II.C.2, below.

[25] *See FPL Order*, 30 FCC Rcd at 1145-47 (¶¶ 17-19).

[26] *See* FPL Br. at 29-32.

[27] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475) (emphasis added); *see also FPL Order*, 30 FCC Rcd at 1145 (¶ 17) (citing cases) (emphasis in original).

"arbitrary and capricious" when using any procedure to ensure "just and reasonable" rates is not.[28]

FPL argues that things are different this time around because the pre-existing telecom rate is a "hard cap" instead of a "reference point."[29] The "hard cap," FPL argues, is "arbitrary and capricious" because it may not fully compensate FPL for its past investment.[30] But FPL has not rebutted the new telecom rate presumption and so it will be fully compensated with a new telecom rental rate.[31] And, even if it had rebutted the presumption, the FCC has still ensured that FPL will be fully compensated by a "just and reasonable" rate.[32] "'Just and reasonable' and 'arbitrary and capricious' are mutually exclusive concepts."[33] Nor can FPL show that any of its investment has been "worthless."[34] FPL has instead been *over*-compensated in the past for its investment and will be compensated for that investment going forward; it has "collected rates

---

[28] *FPL Order*, 30 FCC Rcd at 1145-46 (¶¶ 17-18) ("Florida Power bears a heavy burden. A rule that operates prospectively but affects transactions entered into before its promulgation is invalid only if it is arbitrary and capricious.… 'Just and reasonable' and 'arbitrary and capricious' are mutually exclusive concepts.") (citing cases).

[29] FPL Br. at 31-32.

[30] *Id.* (citing *Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204, 220 (1988) (Scalia, J., concurring) and arguing that, if "FPL recover[s] less than its incremental[ ] cost attributable to AT&T," its additional investment would be "worthless").

[31] *See* Section II.C, below; *see also Pole Attachment Order*, 26 FCC Rcd at 5321 (¶ 183 & n.569) (quoting National Broadband Plan at 110).

[32] *Third Report and Order*, 33 FCC Rcd at 7771 (¶ 129); *see also* Reply Ex. A at ATT00913-14 (Rhinehart Reply Aff. ¶ 3) (stating that the properly calculated pre-existing telecom rate, using the FCC presumptive inputs for an ILEC's attachments, is about 1.5 times the properly calculated new telecom rate).

[33] *FPL Order*, 30 FCC Rcd at 1146 (¶ 19).

[34] This is particularly so because FPL has expressed a desire to remove AT&T from its poles. FPL cannot show that accepting a "just and reasonable" rate from AT&T would render FPL's investment "worthless" when FPL says it would prefer to receive *no* rental income from AT&T. *See* Answer ¶ 17.

under the Agreement for [over] 40 years[,] would be paid a just and reasonable rate going forward," and will continue to "generate[ ] revenue by renting space to cable companies and [C]LECs."[35] Thus, ensuring FPL receives a "just and reasonable" rate from AT&T "will not result in unreasonably low rates" to FPL, or create any unlawful retroactivity.[36]

Third, FPL argues that, "even assuming the *2018 Third Report and Order* applies on a going-forward basis," due process concerns prevent the Commission from applying a new rate to an existing agreement.[37] Not so. FPL was on notice during all years in dispute that it was required by federal law to charge AT&T a "just and reasonable" rate.[38] And the Commission has broad authority "to take whatever action it deems 'appropriate and necessary' [when] it finds a particular rate … to be unjust or unreasonable,"[39] including authority to "[o]rder a refund."[40] Thus, "[t]he Commission has applied a new rate to existing pole attachments on many occasions and has been upheld on appeal,"[41] including in the case that FPL cites.[42]

---

[35] *FPL Order*, 30 FCC Rcd at 1146 (¶ 19); *see also* Answer Ex. A at FPL00007 (Kennedy Decl. ¶ 11) (admitting that FPL leases space to third party attachers, including attachers in the space reserved for AT&T).

[36] *FPL Order*, 30 FCC Rcd at 1146 (¶ 19).

[37] *See* FPL Br. at 32-33.

[38] *See Pole Attachment Order*, 26 FCC Rcd at 5328 (¶ 202) ("[W]here [I]LECs have such access [to utilities' poles], they are entitled to rates, terms and conditions that are 'just and reasonable' in accordance with section 224(b)(1).").

[39] *See Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 77 FCC 2d 187, 195 (¶ 22) (1980); *see also Monongahela Power Co. v. FCC*, 655 F.2d 1254, 1257 (D.C. Cir. 1981) ("The Commission may proceed 'to hear and resolve complaints …,' including those involving preexisting contracts, using the methods for calculating and apportioning costs that it has prescribed.") (internal citation omitted).

[40] 47 C.F.R. § 1.1407(a).

[41] *FPL Order*, 30 FCC Rcd at 1147 (¶ 19 n.61) (citing cases).

[42] *See Ga. Power Co. v. Teleport Commc'ns Atlanta, Inc.*, 346 F.3d 1033 (11th Cir. 2003) (cited at FPL Br. at 32) (affirming *Teleport Commc'ns Atlanta, Inc. v. Ga. Power Co*., 16 FCC Rcd

Fourth, FPL argues that it would be improper to use the new telecom rate presumption to set the "just and reasonable" rate during the applicable 2014 to 2018 statute of limitations.[43] But an "administrative regulation does not operate retroactively merely because it applies to prior conduct."[44] It must also impair rights FPL had during the 2014 to 2018 refund period, increase FPL's liability for those years, or impose new duties on that time period.[45] FPL has not tried to meet this standard, and cannot do so.[46] From 2014 to 2018, FPL was bound by the "just and reasonable" rate requirement, faced equal liability for rent collected in violation of federal law, and was subject to a comparable obligation to justify the rates it charged.[47] For this reason, the Commission need not enforce its presumption to award rate relief; the new telecom rate is the "just and reasonable" rate under the standard adopted by the Commission in 2011 *and* in 2018.[48] FPL cannot avoid just and reasonable new telecom rates based on arguments about retroactivity.

20238, 20239 (¶ 4) (Deputy Chief, Cable Services Bur. 2001); *see also Teleprompter of Fairmont, Inc. v. Chesapeake & Potomac Tel. Co*., 85 FCC 2d 243, 244 (¶ 2) (1981); *Time Warner Entm't v. Fla. Power & Light Co*., 14 FCC Rcd 9149, 9154-55 (¶¶ 14, 15) (Chief, Cable Service Bur. 1999) (terminating unlawful rate under an existing agreement, substituting a new "just and reasonable" rate, and ordering FPL to refund unlawfully collected rental payments plus interest).

[43] *See* FPL Br. at 32-33.

[44] *See id.* at 32 (quoting *Ga. Power Co.*, 346 F.3d at 1042).

[45] *See Ga. Power Co.*, 346 F.3d at 1043 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)).

[46] FPL's argument relies solely on claims about expectations decades ago. *See, e.g.*, FPL Br. at 25 ("forty-three years"), 27 ("more than forty years"), 28 ("several decades"), 29 ("four decades-old"), 31 ("decades long"), 32 ("many decades").

[47] *See Heritage Cablevision Assocs. of Dallas, L.P. v. Tex. Utils. Elec. Co*., 6 FCC Rcd 7099, 7105 (¶ 29) (1991) (quoting 47 C.F.R. § 1.1407(a)); *see also Verizon Va., LLC v. Va. Electr. & Power Co*., 32 FCC Rcd 3750, 3759-61 (¶¶ 20-22) (EB 2017) ("*Dominion Order*") (requiring electric utility to justify its rates).

[48] *See* Compl., Section III.B; *see also* Section II.C-D, below.

2. The New Telecom Rate Presumption Applies To The JUA.

FPL next argues that, if the new telecom rate presumption applies to existing agreements, it should not apply to the JUA. FPL's arguments flatly conflict with the *Third Report and Order* and should be rejected.

First, FPL argues that the JUA was not "new or newly renewed" after the effective date of the *Third Report and Order* because it "has an effective date of January 1, 1975, and was last revised with an effective date of June 1, 2007."[49] But in the *Third Report and Order*, the Commission held that the new telecom rate presumption applies to "new or newly-renewed" agreements which, it explained, include "agreements that are automatically renewed, extended, or placed in evergreen status" following the *Order*'s effective date.[50] FPL cannot read this definition out of the *Order*.

And the JUA falls squarely within the definition. By its terms, the JUA automatically extended after the *Order*'s March 2019 effective date; it states that, after the JUA's initial term expired on January 1, 1980, the JUA "*shall continue* in force thereafter" until it is terminated upon six months written notice.[51] The words "continue" and "extend" are synonyms.[52] FPL admits that the JUA was "valid and enforceable" when the *Third Report and Order* took effect—and thus the JUA must have automatically extended each day after its initial term expired on

---

[49] Answer ¶ 9; *see also* FPL Br. at 22-24.

[50] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475); *see also* FPL Br. at 23 (admitting that "renewal includes agreements that are automatically renewed, extended, or placed in evergreen status") (quoting *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475)).

[51] Compl. Ex. 1 at ATT00128 (JUA, Art. XVI) (emphasis added); *see also* Compl. ¶ 11.

[52] *See* Compl. ¶ 11 ("'Continue' means '[t]o carry further in time, space or development: *extend*' and 'extend' means 'to lengthen, prolong; to *continue* …'") (citations omitted).

January 1, 1980.[53] FPL also admits that, after the *Order*'s effective date, FPL terminated the JUA as it applies to "the further granting of joint use of poles."[54] This placed the JUA in evergreen status because, notwithstanding such termination, the JUA "shall remain in full force and effect with respect to all poles jointly used by the parties at the time of such termination."[55]

FPL is wrong in arguing that the JUA could *not* be placed in evergreen status because it *includes* an "evergreen" provision.[56] The Commission found that a JUA is in "evergreen status" where, as here, the "agreement has been terminated," but the electric utility continues to argue that the lawful "rates [are] established by the joint use agreement for existing attachments."[57] And while FPL states in a footnote that it also provided notice of termination under a separate JUA provision that does not include express evergreen protection,[58] its observation is irrelevant. FPL indisputably provided notice of termination under the evergreen provision, which means that the JUA "shall remain in full force and effect with respect to all poles jointly used by the

[53] FPL Br. at 22-23.

[54] *Id.* at 2; Compl. Ex. 23 at ATT00250 (Notice of Termination (Mar. 25, 2019)) ("[P]ursuant to Article XVI of the Agreement, FPL hereby provides notice that it is terminating all rights related to the further granting of joint use of poles.… [a]s provided by Article XVI.").

[55] Compl. Ex. 1 at ATT00128 (JUA, Art. XVI).

[56] Answer ¶ 12; FPL Br. at 23 n.83. FPL's related claim that the JUA could not "renew," Answer ¶ 12, is refuted by FPL's admission that the JUA remained "valid and enforceable" in March 2019, so must have renewed after its initial term. *See* Answer ¶ 11 (admitting that "an event … occurred in 1980" when the JUA's initial term expired); *see also* Compl. ¶ 11 & n.19 ("Renew" means to "repeat so as to reaffirm" or "begin again") (citations omitted); Compl. Ex. 1 at ATT00128 (JUA, Art. XVI) (setting initial term).

[57] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475) (citing *FPL Order*, 30 FCC Rcd 1140); *see also* FPL Br. at 33 ("The 1975 JUA Rates are Lawful").

[58] FPL Br. at 23 n.83.

parties at the time of [its] termination" in September 2019.[59] The parties continue to jointly use poles after that termination,[60] so the JUA is in "evergreen status" and the new telecom rate presumption applies.[61]

Second, FPL argues that the JUA is not entitled to the presumption because it is not a "pole attachment contract."[62] FPL provides no explanation for this assertion,[63] although FPL has long sought to recharacterize joint use agreements as "infrastructure cost sharing agreements" in an effort to avoid the Commission's rate reforms.[64] But simply re-labeling the JUA does not remove it from the Commission's *Order* requiring application of the new telecom rate presumption, as the JUA still governs the parties' attachments to each other's poles and sets the annual "rental" for that use.[65] And although FPL argues that replacing the JUA rates with proportional new telecom rates would not appropriately share the cost of FPL's capital

[59] *See* FPL Br. at 23 n.83. *See also* Compl. Ex. 1 at ATT00128 (JUA, Art. XVI); Compl. Ex. 23 at ATT00250 (Notice of Termination (Mar. 25, 2019) (mistakenly including August 2019 effective date instead of date "6 months from the date of this letter").

[60] *See, e.g.*, Answer Ex. E at FPL00167 (Murphy Decl. ¶ 6) ("AT&T occupies 401,919 FPL distribution poles in Florida.").

[61] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475).

[62] Answer ¶ 9.

[63] *But see* 47 C.F.R. § 1.726(b) ("The answer shall advise the complainant and the Commission fully requiring fully and completely of the nature of any defense ….").

[64] *See, e.g.*, Reply Comments of FPL et al. at 28, *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future* (Oct. 10, 2010) (arguing that ILECs are not entitled to just and reasonable rates because joint use agreements reflect are "infrastructure cost sharing agreements"); Reply Brief of FPL et al. at 16, *Am. Elec. Power Serv. Corp. v. FCC*, No. 11-1146, 2012 WL 1187988 (D.C. Cir. Apr. 9, 2012) (arguing that "joint use agreements … are infrastructure cost sharing agreements"); *see also* FPL Br. at 1 (describing the JUA as an agreement for "the equitable sharing of the ownership costs of a mutually constructed and beneficial network of poles").

[65] *See, e.g.*, Compl. Ex. 1 at ATT00121 (JUA, Art. X).

investment in the network,[66] that is not true. A properly calculated new telecom rate is "*fully compensatory*" to the pole owner.[67] That does not change when the attacher also owns poles. Instead, the new telecom rate formula, properly applied to each party's use of the other party's poles, will "fully compensate [each] pole owner for costs caused by [the other party's] attachments."[68] Thus, regardless of how FPL describes the JUA, it is a "newly-renewed joint use agreement[ ]" that the Commission has rightly found is presumptively entitled to a just and reasonable, new telecom rate.[69]

Third, FPL argues that the new telecom rate presumption should not apply to the JUA because the Commission sought "to minimize the divergence from past practices for 'privately-negotiated agreements.'"[70] But "past practice" also required FPL to charge AT&T a "just and reasonable" rate under the JUA. Indeed, in 2015, the Commission emphasized that FPL could *not* "force Verizon to pay the relatively high Agreement Rates for as long as its attachments remain on [FPL]'s poles" under a JUA that, like the JUA at issue, was also entered into in 1975.[71] And in its 2018 *Third Report and Order*, the Commission found that the new telecom rate presumption *should* "impact privately-negotiated agreements" entered or renewed after the

---

[66] *See, e.g.*, FPL Br. at 25-27, 31-32. FPL's 10 alleged investments in the network are duplicative of its meritless attempt to rebut the presumption, which is addressed below. *See* Section II.C, below.

[67] *Pole Attachment Order*, 26 FCC Rcd at 5321 (¶ 183 n.569) (quoting National Broadband Plan at 110) (emphasis added); *see also FCC v. Fla. Power Corp.*, 480 U.S. 245, 254 (1987).

[68] *Pole Attachment Order*, 26 FCC Rcd at 5324 (¶ 191).

[69] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127) (applying new telecom rate presumption to "newly-negotiated and newly-renewed joint use agreements").

[70] FPL Br. at 24.

[71] *See FPL Order*, 30 FCC Rcd at 1143, 1150 (¶¶ 10, 25).

Order's effective date.[72] As the Commission explained, a federal statutory right "may not be defeated by private contractual provisions."[73] Any other standard "would subvert the supremacy of federal law over contracts."[74] Thus, as FPL admits, FCC orders override contrary JUA language.[75]

The Commission also explained that the new telecom rate presumption must apply to existing attachments on existing poles under existing JUAs because there lies the "outdated rate disparities" that the presumption is intended to eliminate.[76] FPL would instead require AT&T to pay the egregiously high JUA rates on more than 425,000 existing joint use poles in perpetuity—or incur the cost to deploy an unnecessary, unwanted, and duplicative pole network for existing poles and future pole lines. Nothing could be more contrary to the Commission's goal of reducing infrastructure costs to promote deployment.[77] As a result, the new telecom rate presumption does not, and cannot, have an exception for existing poles.

---

[72] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 & n.475); *see also id.* (¶ 127 & n.479) (rejecting argument "that we should not apply the presumption to existing agreements").

[73] *Id.* at 7731 (¶ 50) (citation omitted).

[74] *Id.* (internal quotation and alternation omitted); *see also In the Matter of Implementation of Section 224 of the Act*, 25 FCC Rcd 11864, 11908 (¶ 105) (2010) ("*Pole Attachment Order NPRM*") ("The Commission would not be fulfilling [its statutory] duty if it were to substitute the requirements of contract law for the dictates of section 224.").

[75] *See* Answer Ex. A at FPL00007 (Kennedy Decl. ¶ 11) ("Under FCC order, FPL is not permitted to reserve four feet of space on each FPL pole for AT&T's use" even though the JUA reserves 4 feet for AT&T's exclusive use); *see also* Compl. Ex. 1 at ATT00111 (JUA § 1.1.7).

[76] *Third Report and Order*, 33 FCC Rcd at 7767, 7770 (¶ 127).

[77] *See, e.g.*, Reply Ex. D at ATT00992, ATT01005-07 (Dippon Reply Aff. ¶¶ 22, 48-52).

C. The New Telecom Rate Is The Just And Reasonable Rate Because FPL Did Not Rebut The Presumption With Clear And Convincing Evidence.

FPL did not provide "clear and convincing evidence that [AT&T] receives net benefits under its pole attachment agreement with [FPL] that materially advantage [AT&T] over other telecommunications attachers."[78] Therefore, by law, the new telecom rate applies.[79] FPL's attempt to rebut the presumption relies primarily on its own word—simply stating that it "provided evidence of eighteen net benefits," without attaching a single executed license agreement or any real-world data to substantiate its allegations and quantifications.[80] This is not "clear and convincing" evidence that rebuts the presumption.[81] A closer review of FPL's allegations—and the license agreements it produced in response to AT&T's interrogatories—confirms that FPL did not and cannot meet its burden.[82]

1. FPL's Case Rests On Foundational Legal Errors.

Several legal errors infect FPL's case and establish that FPL has not rebutted the new telecom rate presumption. *First*, quoting language from the *Third Report and Order* that it considers dispositive, FPL argues that it has rebutted the presumption because "AT&T 'continue[s] to possess greater bargaining power than other attachers [and] … continues to own a

---

[78] *See Third Report and Order*, 33 FCC Rcd at 7768 (¶ 123); *see also, e.g.*, 7A Fed. Proc., L. Ed. § 17:36 (Clear and convincing evidence is "evidence so clear, direct, weighty, and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case.").

[79] 47 C.F.R. § 1.1413(b); *Third Report and Order*, 33 FCC Rcd at 7768 (¶ 123).

[80] *See* FPL Br. at 73; *see also* Reply Ex. D at ATT00989, ATT00996-97 (Dippon Reply Aff. ¶¶ 15, 33).

[81] *See, e.g.*, *In re Applications of Priscilla L. Schwier*, 4 FCC Rcd 2659, 2660 (¶ 7) (1989) ("General conclusory allegations and speculation simply are not sufficient.").

[82] Representative license agreements are attached as Reply Exhibits 1-4.

large number of poles.'"[83] But, FPL takes this language out-of-context. It does not create a new way to rebut the presumption. Instead, this language merely explains why the Commission made the new telecom presumption rebuttable—ILECs that own a large number of poles relative to the electric utility may be able to negotiate a JUA that provides the ILEC a net material advantage over its competitors. But even in such cases, there is just one way to rebut the presumption—with clear and convincing evidence that the ILEC "receives net benefits that materially advantage the [I]LEC over other telecommunications attachers."[84] And, with FPL's pole ownership advantage now "two-to-one (67% to 33%),"[85] this is not a case where AT&T has leverage to negotiate "just and reasonable" rates.[86] Absent evidence of net material competitive advantages under the JUA, the new telecom rate applies.[87]

Second, FPL tries to eliminate the principle of competitive neutrality from the analysis, arguing that the JUA provides "value to AT&T."[88] But mere "value" is not the legal standard and has not been the legal standard since 2011; the JUA must provide AT&T net material *competitive* value to justify charging AT&T a rate higher than the new telecom rate.[89] Much of

---

[83] FPL Br. at 72 (quoting *Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126)).

[84] *Third Report and Order*, 33 FCC Rcd at 7770-71 (¶ 128).

[85] *See* Compl. ¶ 23; Answer ¶ 23 ("FPL admits that the relative pole ownership percentages supplied by AT&T in paragraph 23 are accurate."); *see also Pole Attachment Order*, 26 FCC Rcd at 5329 (¶ 206) ("[E]lectric utilities appear to own approximately 65-70 percent of poles, compared to historical ownership levels that that were closer to parity."); *Dominion Order*, 32 FCC Rcd at 3757 (¶ 13) (relying on "Dominion's nearly two-to-one pole ownership advantage").

[86] Compl. Ex. D at ATT00086 (Dippon Aff. ¶ 26).

[87] *Third Report and* Order, 33 FCC Rcd at 7770-71 (¶ 128).

[88] *See, e.g.*, FPL Br. at 43.

[89] *See Third Report and Order*, 33 FCC Rcd at 7767-68 (¶ 123); *see also* 47 C.F.R. § 1.1413(b); *Pole Attachment Order*, 26 FCC Rcd at 5336-37 (¶¶ 217-18) (holding that an ILEC should be charged "the same rate as the comparable competitors" unless the JUA "includes provisions that materially advantage the [I]LEC *vis a vis* a telecommunications carrier or cable operator"); *FPL*

FPL's analysis is thus irrelevant. The two alleged benefits FPL describes as "chief" speak to the wrong question, alleging that (1) it "has built and maintained, and continues to build and maintain, poles of sufficient height and strength to accommodate" attachers in addition to FPL, and (2) that "even in the event of a termination, AT&T can remain attached to FPL's poles."[90] Each can be said equally of AT&T's competitors.[91] FPL cannot rebut the presumption with alleged benefits that even FPL says apply to "the entire communication/CATV industry."[92]

Third, FPL all but ignores the impact of the JUA's termination on its analysis of a just and reasonable rate post-termination, except to admit in a footnote that its reliance on an alleged benefit "assumes" the JUA does not remain terminated.[93] But FPL cannot prove that AT&T is materially advantaged by alleged "benefits" which do not exist (assuming they ever did) now that "the further granting of joint use of poles" has been terminated.[94] And the vast majority of

---

Order, 30 FCC Rcd at 1140 (¶ 2) (emphasizing that alleged benefits must "not [be] available to competitive LECs").

[90] Answer ¶ 8; *see also* Answer Ex. A at FPL00003 (Kennedy Decl. ¶ 7) ("But for the JUA, FPL is not and never has been obligated to build pole infrastructure tall enough to accommodate more facilities than what is required to serve its electric customers.").

[91] *See* Answer Ex. A at FPL00006 (Kennedy Decl. ¶ 9) (If FPL installed poles only for FPL's "own purposes …. it would not only impact AT&T, but the entire communication/CATV industry"); FPL Br. at 60 (FPL is under a "legal obligation to provide mandatory access" to its poles to "CLECs and CATV providers"); 47 U.S.C. § 224(f) (guaranteeing pole access to AT&T's competitors, even in the event of termination of their license agreements).

[92] Answer Ex. A at FPL00006 (Kennedy Decl. ¶ 9); *see also, e.g.*, *id.* (Kennedy Decl. ¶ 10) (admitting that "in many instances AT&T's alleged rivals" are comparably situated); *id.* at FPL00012 (Kennedy Decl. ¶ 17) (admitting comparability of AT&T and "all carriers providing telecommunications services"); *id.* at FPL00014 (Kennedy Decl. ¶ 23) (admitting alleged benefit "may also meet the requirements of other telecom providers").

[93] *See id.* at FPL00008 (Kennedy Decl. ¶ 11 n.14).

[94] Compl. Ex. 1 at ATT00128 (JUA, Art. XVI); Compl. Ex. 23 at ATT00250 (Notice of Termination (Mar. 25, 2019)); *see also FPL Order*, 30 FCC Rcd at 1148 (¶ 22) (requiring "prospective value").

FPL's alleged benefits fall into this category. FPL, for example, relies on the height and strength of possible future new pole lines to which AT&T cannot attach[95] and on one-time differences that occur, if ever, when AT&T attaches its facilities in the future to a new FPL pole line.[96] These alleged benefits cannot occur when FPL has terminated the JUA giving AT&T the right to attach to these future new FPL pole lines. The vast majority of FPL's alleged benefits fall into this category. FPL argues that AT&T has received this preferential treatment (*i.e.*, a benefit) under the JUA because an "existing attachment … has already been deployed."[97] But FPL has not, and cannot, show that a one-time service provided years or decades ago *continues* to provide AT&T competitive value that should be embedded into an annually recurring per-pole rental rate, particularly when AT&T has been paying annual per-pole rates that were many multiples of its competitors' throughout that time period as well.[98]

Finally, FPL did not account for "*net* benefits" as required.[99] FPL admits that AT&T owns more than 213,000 poles to which FPL is attached and that AT&T bears unique costs as a result.[100] The Commission has long emphasized that any analysis of "competitive neutrality" must "account for … different rights *and responsibilities*."[101] Rebutting the presumption thus

---

[95] *See, e.g.*, Answer Ex. A at FPL00005, FPL00014 (Kennedy Decl. ¶¶ 9, 25) (pole height and strength).

[96] *See, e.g.*, *id.* at FPL00006, FPL00010, FPL00012 (Kennedy Decl. ¶¶ 10, 15, 17) (permitting, make-ready, acquiring permission to use the right-of-way).

[97] *See* Answer ¶ 16.

[98] *See, e.g.*, Compl. Ex. D at ATT00092 (Dippon Aff. ¶ 38); *see also FPL Order*, 30 FCC Rcd at 1149 (¶ 24) (considering "the difference between the Agreement Rates and the New … Telecom Rates *over time*") (emphasis added).

[99] *Third Report and Order*, 33 FCC Rcd at 7767-68 (¶ 123) (emphasis added).

[100] FPL Br. at 65; Answer Ex. A at FPL00025 (Kennedy Decl., Ex. A).

[101] *Pole Attachment Order*, 26 FCC Rcd at 5335 (¶ 216 n.654) (emphasis added).

requires FPL to prove that AT&T has a "net benefit" after accounting for competitive *disadvantages* that impose additional costs on AT&T relative to its competitors.[102] These include reciprocal terms in the JUA that require AT&T to provide the same alleged "benefit" to FPL[103] and that impose pole ownership costs on AT&T, but not on its competitors under FPL's license agreements.[104]

FPL makes four arguments that would have the Commission eliminate "net benefits" from the analysis. These arguments lack legal and factual merit.[105] FPL first claims that AT&T could own fewer poles (and thus have lower pole ownership costs) if AT&T had agreed to sell poles to FPL.[106] This argument assumes FPL made a formal offer to purchase AT&T's poles, which it did not.[107] It also confirms that AT&T *does* own poles—and therefore *does* incur unique pole ownership costs that must be accounted for when trying to rebut the presumption.[108] FPL next asserts that AT&T "does not actually invest in its pole network,"[109] hyperbole that is flatly contradicted by AT&T's publicly reported pole investment data[110] and FPL's admission that AT&T does incur "pole ownership costs."[111] FPL's third argument is that AT&T's pole

---

[102] *Third Report and Order*, 33 FCC Rcd at 7768 (¶ 123).

[103] *See, e.g.*, *Dominion Order*, 32 FCC Rcd at 3760 (¶ 21) (finding Dominion could not justify the rates it charged by "identifying as alleged 'benefits' to Verizon services that Verizon is likewise required to extend to Dominion under the Joint Use Agreements").

[104] *See, e.g.*, Compl. Ex. B at ATT00059 (Miller Aff. ¶¶ 25-26).

[105] FPL Br. at 63-65.

[106] *Id.* at 63.

[107] Reply Ex. C at ATT00965 (Peters Reply Aff. ¶ 8).

[108] Compl. Ex. B at ATT00059-60 (Miller Decl. ¶¶ 25-26).

[109] FPL Br. at 63-64.

[110] *See, e.g.*, Reply Ex. A at ATT00931 (Rhinehart Reply Aff. ¶ 39).

[111] *See* FPL Br. at 65; *see also* Reply Ex. A at ATT00931 (Rhinehart Reply Aff. ¶ 39).

ownership costs should be irrelevant because AT&T should be "reimbursed for its pole ownership costs through the rates it charges attachers."[112] FPL thus implicitly admits that rates for AT&T and FPL *should* be set at the fully compensatory new telecom rate. Fourth, FPL argues that reciprocal provisions in the JUA may not apply equally to the parties because FPL owns two-thirds of the jointly used poles.[113] But FPL relies on alleged "benefits" that apply equally to the parties regardless of the pole ownership disparity—each, for example, has insurance requirements that apply to all jointly used poles and has not taken out a [redacted] security bond in order to attach to the other's poles.[114] And, in any event, FPL's theory would still require an offset to account for "alleged 'benefits' … that [AT&T] is likewise required to extend to [FPL] under the [JUA]."[115] FPL provides none, and so has failed to rebut the presumption.[116]

2. FPL's 18 Alleged Benefits Are Redundant And Replete With Flaws.

A review of the 18 "benefits" that FPL alleged also confirms that FPL failed to rebut the new telecom rate presumption.[117] Its list contains hypothetical, irrelevant, repetitive, unsupported, and non-existent "benefits" in an attempt to create net material competitive value where none exists.[118]

---

[112] FPL Br. at 65.

[113] *Id.*

[114] *See* Compl. Ex. C at ATT000068-69 (Peters Aff. ¶ 10); Compl. Ex. D at ATT00091 (Dippon Aff. ¶ 36); Reply Ex. C at ATT00967-68 (Peters Reply Aff. ¶ 12); Reply Ex. D at ATT01004-05 (Dippon Reply Aff. ¶ 46); *see also, e.g.*, Reply Ex. 1 at FPL-000216 (License 1 § 14.1).

[115] *See Dominion Order*, 32 FCC Rcd at 3760 (¶ 21).

[116] *Third Report and Order*, 33 FCC Rcd at 7770-71 (¶ 128) ("Utilities can rebut the presumption we adopt today in a complaint proceeding by demonstrating that the [I]LEC receives *net benefits* that materially advantage the [I]LEC over other telecommunications attachers.") (emphasis added).

[117] FPL Br. at 47-60.

[118] *See, e.g.*, Reply Ex D at ATT00987-89, ATT00996-97 (Dippon Reply Aff. ¶¶ 13-14, 33-47).

First, FPL claims that AT&T avoided "market" rates to attach to FPL's poles.[119] But AT&T has been paying rates that are *higher* than rates that would be charged in a competitive market.[120] And FPL explains why: without AT&T having a statutory right of access to FPL's poles, FPL can charge AT&T any rate it wants up to the cost of "building [AT&T]'s own pole line, undergrounding its own facilities or establishing a wire[line] network on non-FPL facilities."[121] FPL then points to the "unregulated attachment rate" it has imposed on three entities, and claims that AT&T "avoided" similarly high "market" rates (although AT&T pays a rate higher than this "unregulated attachment rate" to attach to FPL's transmission poles).[122] The argument is thus absurd, but also irrelevant. AT&T has a federal right to a "just and reasonable" rate that is presumptively the new telecom rate.[123] FPL cannot rebut that presumption by pointing to unjust and unreasonable monopoly rates it charges others or could otherwise have imposed on AT&T.

FPL is also wrong when it claims that but for the JUA, it could charge AT&T these monopoly rates even though AT&T has the right to "just and reasonable" rates.[124] FPL's claim requires some imagination; FPL pretends that without the JUA, it would have installed poles that could not accommodate *any* communications attachers.[125] Then FPL claims that, even if "the

---

[119] *See* FPL Br. at 48-49.

[120] *See, e.g.*, Reply Ex. D at ATT00997 (Dippon Reply Aff. ¶ 35).

[121] FPL Br. at 48.

[122] *See id.* at 48-49; Answer Ex. A at FPL00003-04 (Kennedy Decl. ¶ 7); FPL's Resp. to AT&T's Interrog. No. 5 (showing rates charged [redacted]).

[123] *See Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126).

[124] FPL Br. at 48 n.179.

[125] *Id.* at 48.

FCC regulated access to and rates, terms, and conditions for ILECs, … FPL's poles would have been at full capacity and AT&T would be a buyer 'waiting in the wings'" for pole space.[126] In that scenario, FPL postulates that the Eleventh Circuit may have found that pole space was "rivalrous," such that the provision of pole space to one entity precludes another from attaching to the pole.[127] Then, FPL guesses, the Eleventh Circuit may have found that FPL's monopoly rates are the proper measure of "just compensation."[128]

But none of this happened. FPL installed distribution poles that "stand 55-feet tall" for FPL's own purposes—to "strengthen [the] electric grid."[129] It also installed poles with the expectation that several communications providers would attach.[130] And several can attach; FPL's average pole height is 40.4 feet,[131] and a shorter 37.5-foot pole presumptively holds 4 communications attachers.[132] Space is not scarce on FPL's poles, and so FPL cannot substitute so-called "market rates" for "just and reasonable" rates.[133]

---

[126] *Id.* at 48 n.179 (quoting *Ala. Power Co. v. FCC*, 311 F.3d 1357, 1370 (11th Cir. 2002)); *see also* Answer, Affirmative Defense K.

[127] FPL Br. at 48 n.179; *see also Ala. Power Co.*, 311 F.3d at 1370-71.

[128] FPL Br. at 48 n.179; *see also Ala. Power Co.*, 311 F.3d at 1370-71.

[129] *See* Reply Ex. 6 (Featured Stories: FPL installs new poles to strengthen electric grid and help communities prepare for hurricane season).

[130] *See* Initial Comments of FPL et al. Regarding Safety and Reliability at 6, *In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules* (Mar. 7, 2008) ("Third party attachment standards … are part in parcel of an electric utility's overhead distribution construction standards."). Data show that FPL has installed poles of comparable height regardless of whether FPL is the only attacher, whether AT&T is attached, or whether a third party is also attached. *See* Reply Ex. D at ATT01001-02 (Dippon Reply Aff. ¶ 42); *see also* Reply Ex. A at ATT00932 (Rhinehart Reply Aff. ¶ 40).

[131] *See* Answer Ex. A at FPL00015 (Kennedy Decl. ¶ 28).

[132] 47 C.F.R. §§ 1.1409(b), 1.1410.

[133] *See Ala. Power Co.*, 311 F.3d at 1370-71.

Second, FPL argues that AT&T enjoyed "savings" over other ILECs.[134] But FPL cannot rely on the "unjust and unreasonable" rates it charges to other ILECs to rebut a presumption that AT&T is entitled to "just and reasonable" rates.[135] And regardless, FPL is wrong about AT&T's alleged "savings."[136] FPL points to rates for wood distribution poles, which it says were about [redacted] lower for AT&T than for some other ILECs.[137] But FPL charged AT&T rates for concrete distribution poles that were about [redacted] than the rates charged the same ILECs.[138] AT&T was not advantaged.[139]

Third, FPL claims that AT&T is advantaged because FPL says that it installed joint use poles 10 feet taller than the non-joint use poles that could meet its own service needs.[140] This argument is specious. AT&T is not advantaged over its competitors because FPL installed poles "taller than [FPL] needs to serve its electric customers."[141] AT&T *and* its competitors require

---

[134] FPL Br. at 50. This claim contradicts FPL's prior assertion that "the rates invoiced and paid for all ILECs using its poles are the same." *See* FPL's Answer to Verizon's Interrog. No. 5, publicly filed as Verizon's Public Reply Ex. 5, *Verizon Fla. LLC v. Fla. Power & Light Co.*, Dkt. No. 15-73, File No. EB-15-MD-002.

[135] *See* 47 C.F.R. § 1.1413(b) (presumption must be rebutted with evidence regarding "other telecommunications carriers or cable television systems providing telecommunications services *on the same poles*") (emphasis added). By definition, ILECs are not "on the same poles" with other ILECs.

[136] FPL Br. at 50.

[137] *See also* FPL's Resp. to AT&T's Interrog. No. 5.

[138] *See id.* FPL charged another ILEC rates [redacted]—about [redacted] the rate AT&T paid for use of wood distribution poles and transmission poles and [redacted] the rate AT&T paid for use of concrete distribution poles. *Id.*

[139] Reply Ex. A at ATT00934 (Rhinehart Reply Aff. ¶ 43).

[140] FPL Br. at 50-51; *see also* Answer Ex. A at FPL00005, FPL00030, FPL00032 (Kennedy Decl. ¶ 9 & Ex. C) (relying on alleged difference in cost for 35-foot and 45-foot poles).

[141] FPL Br. at 50.

FPL's joint use poles.[142] As FPL explained, "if FPL were to install poles 10' shorter, it would not only impact AT&T but the entire communication/CATV industry."[143]

Indeed, pole height alone cannot rebut the new telecom rate presumption because the new telecom rate is "fully compensatory" for poles of whatever height FPL installed.[144] And FPL bases its valuation of this claim on installation of 45-foot poles, but it could *not* have installed them because of the JUA, as the JUA defines a "normal joint use pole" as a 35- or 40-foot pole.[145] Indeed, more than half of the joint use poles recently sampled by FPL's contractor were 30-, 35-, or 40-foot poles.[146] And there is sufficient room on a 35-foot pole or a 40-foot pole for FPL, AT&T, and many other communications providers.[147]

FPL also cannot credibly fault AT&T for the installation of poles 10 feet taller based on AT&T's space requirements.[148] FPL's best-case-scenario is that "AT&T occupies an average of 1.18' of space per joint use pole" and FPL admits that it does not reserve any additional space for

---

[142] *See, e.g.*, Reply Ex. C at ATT00971-72 (Peters Reply Aff. ¶ 19).

[143] Answer Ex. A at FPL00006 (Kennedy Decl. ¶ 9).

[144] *See* 18 C.F.R. Pt. 101 (stating that Account 364 includes "[p]oles, wood, steel, concrete, or other material"); *In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12176 (App. E-2) (2001) ("*Consolidated Partial Order*") (App. E-2) (including investment in Account 364 in new telecom rate calculation); *Pole Attachment Order*, 26 FCC Rcd at 5321 (¶ 183 n.569) (finding new telecom rate "fully compensatory").

[145] Compl. Ex. 1 at ATT00111 (JUA § 1.1.5).

[146] Answer Ex. E at FPL00174-217 (Murphy Decl., Ex. B); *see also* Reply Ex. A at ATT00931-32 (Rhinehart Reply Aff. ¶ 40).

[147] *See, e.g.*, 47 C.F.R. §§ 1.1409(b), 1.1410 (presuming 5 attaching entities on a 37.5-foot pole); Reply Ex. C at ATT00972 (Peters Reply Aff. ¶ 20).

[148] FPL Br. at 50-51.

AT&T.[149] AT&T does not require a 10 foot taller pole to use 1.18 feet of space. Nonetheless, FPL tries to increase the space needed by AT&T to try to justify the need for a 10 foot taller pole by rounding up after combining 4 feet of space FPL was supposed to reserve for AT&T under the JUA but did not[150] and 3.33 feet of "safety space" the Commission long ago found is "usable and used by the electric utility."[151] But just and reasonable rates are based on space that is "*actually occupied*,"[152] and AT&T does not "actually occupy" materially greater space—or require taller poles—than its competitors.[153]

Fourth, FPL alleges that it "voluntarily expand[s] capacity" to make room for AT&T and installed poles tall enough to let AT&T "avoid make-ready."[154] AT&T does the same for FPL.[155] And FPL voluntarily expands capacity to make room for AT&T's competitors and installed poles tall enough to let those competitors avoid make-ready as well.[156]

---

[149] Answer Ex. A at FPL00007 (Kennedy Decl. ¶ 11) ("[A]fter AT&T has already made its first attachment, FPL cannot deny access to attachers requesting to attach in the remaining amount of AT&T's reserved space."); Answer Ex. E at FPL00166 (Murphy Decl. ¶ 3) (stating that "AT&T occupies an average of 1.18' of space per joint use pole").

[150] *See* Answer Ex. A at FPL00007 (Kennedy Decl. ¶ 11) ("FPL is not permitted to reserve four feet of space on each FPL pole for AT&T's use.").

[151] *See* FPL Br. at 70 n.278 (acknowledging "[t]he Commission's prior order regarding safety space being allocated to the electric utility"); *see also Consolidated Partial Order*, 16 FCC Rcd at 12130 (¶ 51) (holding "the 40-inch safety space … is usable and used by the electric utility"); *Television Cable Serv., Inc. v. Monongahela Power Co*., 88 FCC 2d 63, 68 (¶¶ 10-11) (1981) (rejecting argument that "the 40-inch safety space" should be added "to the 12 inches regularly allotted to [a cable attacher] to compute the space occupied").

[152] *Consolidated Partial Order*, 16 FCC Rcd at 12143 (¶ 78) (emphasis added); *see also* 47 C.F.R. § 1.1406(d).

[153] *See, e.g.*, 47 C.F.R. §§ 1.1410; *see also* Compl. Ex. C at ATT00069 (Peters Aff ¶ 11); Reply Ex. C at ATT00975 (Peters Reply Aff. ¶ 25).

[154] FPL Br. at 51.

[155] Reply Ex. C at ATT00973-74 (Peters Reply Aff. ¶ 22).

[156] *See* Answer Ex. A at FPL00006 (Kennedy Decl. ¶ 10); FPL Br. at 52.

FPL relies on some undefined number of "times" when it may choose not to expand capacity for AT&T's competitors,[157] but FPL has the equivalent right under the JUA.[158] And the number of times that FPL would be faced with a decision of whether to replace a pole to provide additional space must be few. FPL says its poles average 40.4 feet tall, so they should accommodate more than 4 communications attachers,[159] particularly when using "a range of practices, such as line rearrangement, overlashing, boxing, and bracketing."[160] And where a pole replacement is needed, FPL has every incentive to provide it, as FPL will then receive additional rental income and [redacted].[161]

FPL's claim that AT&T "avoided" make-ready is a mere repackaging of its meritless pole height claim. FPL relies on its hypothetical scenario in which FPL did not install joint use poles that could accommodate any communications attachers.[162] Then, FPL reasons, AT&T would have had to pay make-ready to replace all of FPL's poles with taller poles "that could accommodate communication space as well as a communication worker safety space."[163] FPL

[157] Answer Ex. A at FPL00006 (Kennedy Decl. ¶ 10).

[158] FPL Br. at 51 (admitting it is only "in certain circumstances" that FPL must "expand capacity to accommodate AT&T").

[159] *See* Answer Ex. A at FPL00015 (Kennedy Decl. ¶ 28) (40.4 foot average pole height); *see also* 47 C.F.R. §§ 1.1409(c), 1.1410 (presuming a 37.5-foot pole can hold 5 attaching entities).

[160] *Pole Attachment Order NPRM*, 25 FCC Rcd at 11872 (¶ 16); *see also Pole Attachment Order*, 26 FCC Rcd at 5341 (¶ 232) ("capacity is not insufficient where a request can be accommodated using traditional methods of attachment").

[161] *See* Reply Ex. C at ATT0073-74 (Peters Reply Aff. ¶ 22).

[162] *See* FPL Br. at 52.

[163] *Id.*

thus claims that AT&T "avoided" the cost of replacing every FPL pole, which it says would have been 35-foot poles, with 45-foot poles at present-day value.[164]

FPL's replacement cost methodology has been soundly rejected.[165] And the argument itself makes no sense. AT&T could have attached to shorter 35-foot and 40-foot poles without replacing them, as reflected in the JUA.[166] It is also a disingenuous argument, as FPL has installed 40-foot poles where AT&T is attached—and 45-foot poles where AT&T is not (and cannot be) attached.[167] It is thus mere fiction to claim that AT&T would have had to rebuild FPL's network absent the JUA, let alone rebuild it using modern-day materials at current-day costs.[168]

It is also pure fantasy to imply that AT&T's competitors needed to replace FPL's pole each time they attached.[169] FPL admits that "in many instances AT&T's alleged rivals can use any available space on an existing joint use pole."[170] And so FPL provides what must be an alternate valuation for allegedly "avoided" make-ready on poles that have "a communications

---

[164] Answer Ex. A at FPL00006, FPL00035 (Kennedy Decl. ¶ 10 & Ex. D) (alleging value based on a current day [redacted] estimate to replace 35-foot pole with a 45-foot pole). FPL also claims that it costs "as much as [redacted]" to install a replacement concrete pole, *id.* at FPL00006 (Kennedy Decl. ¶ 10), but later states it costs [redacted], *id.* at FPL00014 (Kennedy Decl. ¶ 25).

[165] *See Ala. Cable Telecomm. Ass'n v. Ala. Power Co*., 16 FCC Rcd 12209, 12234 (¶ 57) (2001) ("Respondent's final attempt at appraisal, using replacement costs … also fails.").

[166] Compl. Ex. 1 at ATT00111 (JUA § 1.1.5).

[167] Reply Ex. D at ATT01001-02 (Dippon Reply Aff. ¶ 42); *see also* Reply Ex. A at ATT00932 (Rhinehart Reply Aff. ¶ 40).

[168] Reply Ex. A at ATT00931-32 (Rhinehart Reply Aff. ¶ 40); Reply Ex. C at ATT00977 (Peters Reply Aff. ¶ 29); Reply Ex. D at ATT00999-102 (Dippon Reply Aff. ¶¶ 38-42).

[169] *See* Answer Ex. A at FPL00006 (Kennedy Decl. ¶ 10) (assuming replacement of every pole).

[170] *Id.*

space and … safety space already."[171] But this valuation is useless because FPL omitted the make-ready costs that AT&T paid over the same time period[172] and provided no "backup or itemization" to permit a comparison.[173] It thus adds nothing to state that AT&T's competitors, like AT&T, paid costs related to "cable and conductor rearrangement as well as pole change-outs" over the last 5 years.[174]

Fifth, FPL argues that the JUA advantages AT&T's wireless affiliate because AT&T may someday seek to acquire and sublet space on FPL's poles to its wireless affiliate.[175] FPL's argument is ridiculous and irrelevant. AT&T's wireless affiliate does not need to acquire space on FPL's poles under the JUA and certainly not at the excessive rates that FPL has charged

---

[171] FPL Br. at 52.

[172] *See Answer* Ex. A at FPL00013 (Kennedy Decl. ¶ 19) (admitting AT&T pays FPL for make-ready and pole replacements).

[173] *See Knology, Inc. v. Ga. Power Co.*, 18 FCC Rcd 24615, 24636 (¶ 50) (2003); *see also In Re Applications of John D. Bomberger*, 7 FCC Rcd 1849, 1852 (¶ 31 n.15) (1992) (finding data unreliable where party "did not produce any back-up documents to his written but factually unsupported cost estimates"). FPL did not include any supporting documentation in its Answer for its claim that AT&T's competitors paid over [redacted] in make-ready from 2014-2018. *See* FPL Br. at 52; Answer Ex. A at FPL00007 (Kennedy Decl. ¶ 10). It also failed to substantiate the claim when responding to AT&T's interrogatories, as it produced invoices amounting to [redacted]. *See* Reply Ex. C at ATT00970 (Peters Reply Aff. ¶ 16).

[174] *See* FPL Br. at 52; Answer Ex. A at FPL00006-07 (Kennedy Decl. ¶ 10); *see also Dominion Order*, 32 FCC Rcd at 3759 (¶ 20) (rejecting valuation based on "the amount that all of its licensees 'collectively' paid, thus omitting the information needed to analyze whether, and if so, the extent to which, Verizon has been advantaged relative to a typical competitor or an average of its competitors.").

[175] FPL Br. at 53. FPL's claimed [redacted] valuation of this alleged advantage is particularly hypothetical. It assumes AT&T's affiliate would replace 10,000 35-foot FPL poles with 45-foot poles to deploy wireless nodes. But FPL says its poles already average 40.4 feet in height and, in any event, there are other infrastructure options in the area—such as AT&T's 213,210 poles. *See* FPL Br. at 53; Answer Ex. A at FPL00007-08, FPL00025, FPL00035 (Kennedy Decl. ¶ 11, n.13 & Exs. A, D).

AT&T; it has its own statutory right to attach to FPL's poles at the new telecom rate.[176] Also, AT&T's wireless affiliate is not a party to the JUA or this proceeding.[177] Moreover, FPL's argument relies on pure speculation, imputing an advantage to AT&T that it has not sought and does not receive: 4 feet of space on FPL's poles for wireless attachments.[178] Lastly, FPL does not explain how AT&T could sublet space on FPL's poles when the JUA allows only a pole owner to sublet space on its own poles.[179]

Sixth, FPL argues that AT&T is advantaged because FPL typically invoices AT&T for rent in March following a rental year, but sends "other telecom providers" a semi-annual invoice in December and June.[180] This certainly has not advantaged AT&T over its competitors because AT&T has paid far higher JUA rates annually.[181] Nor would it advantage AT&T over its competitors if AT&T paid the new telecom rates it seeks here, as AT&T would then pay the same annual rate in March that its competitors pay semi-annually 3 months earlier in December and 3 months later in June.[182] FPL's claimed advantage is inappropriately based on the "unjust

---

[176] *See Pole Attachment Order*, 26 FCC Rcd at 5306 (¶ 153) ("We also reaffirm that wireless carriers are entitled to the benefits and protection of section 224, including the right to the telecom rate under section 224(e).").

[177] FPL Br. at 53.

[178] *See id.*; Answer Ex. A at FPL00007 (Kennedy Decl. ¶ 11).

[179] *See* Answer Ex. A at FPL00008 (Kennedy Decl. ¶ 11) (citing JUA § 14.4); *see also* Compl. Ex. 1 at ATT00127 (JUA § 14.4) ("Each Owner reserves the right to use, or permit to be used by other third parties, such attachments *on poles owned by it* which would not interfere with the rights of the Licensee with respect to use of such poles.") (emphasis added).

[180] *See* FPL Br. at 54; Answer Ex. A at FPL00008 (Kennedy Decl. ¶ 12); FPL's Resp. to AT&T's Interrog. No. 5.

[181] FPL's Resp. to AT&T's Interrog. No. 5.

[182] *See* Reply Ex. D at ATT01003-04 (Dippon Reply Aff. ¶ 45); *see also* FPL's Resp. to AT&T's Interrog. No. 5 (showing FPL billed CLECs a $10.44 per pole rate, and cable companies a $10.46 per pole rate, in December 2014 and June 2015); Compl. Ex. A at ATT00016 (Rhinehart

and unreasonable" rates AT&T pays instead of the rates that would set AT&T on par with its competitors, improperly ignores the reciprocal delay in FPL's payment of rent to AT&T, mischaracterizes the time differential, and incorrectly uses an interest rate considerably higher than it could have earned had it received payment earlier and invested the funds.[183]

Seventh, FPL argues that AT&T is advantaged by its lowest position on the pole and ascribes an unexplained "[redacted]" value to that position "[redacted]."[184] FPL claims that AT&T's position on the pole causes make-ready delays to its competitors that AT&T does not experience,[185] but, as FPL admits, the Commission has worked to eliminate such delays with its one-touch make-ready rules.[186] And AT&T can experience similar delays if make-ready is required for its own attachments.[187]

Once attached, AT&T's position on the pole increases AT&T's costs as compared to its competitors.[188] FPL disagrees, but only because it is "unaware of any accidents necessitating AT&T's replacement of a joint use pole cause[d] by AT&T's attachment position on the pole."[189] This head-in-the-sand approach does not rebut AT&T's evidence of damage to its facilities, which may or may not require replacement of a pole,[190] especially when FPL's license

---

Aff., Ex. R-1) (calculating a $10.46 per pole new telecom rate for the 2014 rental year, which would have been invoiced in March 2015).

[183] Reply Ex. D at ATT01002-03 (Dippon Reply Aff. ¶¶ 44-45); *see also* Answer Ex. A at FPL00009 (Kennedy Decl. ¶ 12).

[184] *See* FPL Br. at 54-55; *see also* Answer Ex. A at FPL00116 (Kennedy Decl., Ex. J).

[185] FPL Br. at 54-55.

[186] *Id.* at 55 n.208.

[187] Reply Ex. C at ATT00977-78 (Peters Reply Aff. ¶ 30).

[188] *See, e.g.*, Compl. Ex. B at ATT00060 (Miller Aff. ¶¶ 27-28).

[189] *See* FPL Br. at 55.

[190] *See* Reply Ex. C at ATT00978-79 (Peters Reply Aff. ¶ 33).

agreements [redacted].[191] And while FPL questions why AT&T did not try to negotiate a different position given the increased costs, FPL answers its own question by admitting that AT&T's location is the result of the origin of joint use, and must generally continue so that various communications facilities do not crisscross midspan.[192]

Eighth, FPL claims that AT&T is advantaged when FPL replaces its poles that are too old or must be relocated due to roadwork.[193] But AT&T's competitors are equally advantaged by these pole replacements and relocations, as FPL admits: "other telecom attachers are able to free ride on this arrangement because they are attached to a joint use pole."[194]

Ninth, FPL claims that AT&T saves time and money because it does not use the same permitting process that its competitors use before attaching to FPL's poles.[195] As to time savings, FPL admits that the Commission's one-touch make-ready rules undercut arguments about potential delay.[196] And even before those rules, FPL boasted that it could complete make-ready for attachers in as few as 27 days.[197] AT&T has required comparable time to attach, which

---

[191] *See* Reply Ex. 1 at FPL-000214 (License 1 [redacted]); Reply Ex. 2 at FPL-000794 (License 2 [redacted]); Reply Ex. 3 at FPL-002804 (License 3 [redacted]); Reply Ex. 4 at FPL-002072 (License 4 [redacted]).

[192] *See* FPL Br. at 54 ("standard practice and code compliance" requires AT&T's location).

[193] *See id.* at 55. This argument highlights some of the unique pole ownership costs required of AT&T, but not its competitors, as AT&T also replaces its poles when they are too old or must be relocated due to roadwork without contribution from other attachers. *See* Ex. C at ATT00968 (Peters Reply Aff. ¶ 13).

[194] FPL Br. at 55.

[195] FPL Br. at 56.

[196] Answer Ex. A at FPL00009 (Kennedy Decl. ¶ 13) ("[T]he FCC's new one touch make-ready process provides AT&T's alleged competitors some potential relief from … delays.").

[197] *See* Decl. of Thomas J. Kennedy, P.E. in Support of FPL's Comments, W.C. Dkt. 07-245 (Aug. 16, 2010) at ¶ 17 ("Kennedy 2010 Comments Decl."); *see also* Second Decl. of Thomas J.

makes sense because it must perform the same work managed through the same joint use software program its competitors use.[198]

As to permit fees, FPL "has given us nothing except its conclusory allegations."[199] It relies on "typical" fees, does not provide invoices to substantiate those fees, does not disclose the fees it charged historically, and does not subtract permit fees that FPL did not have to pay to attach to AT&T's poles.[200] FPL also builds its valuation on the same unreasonable assumption that "AT&T would require make-ready on all new attachments without a joint use agreement."[201] In reality, "FPL does not perform communications make-ready work in the communications space"[202] and so, at best, requires a make-ready permit for work in the electric space, which it says is needed just 10 percent of the time.[203] FPL also admits that the permit fees cover the cost of services FPL does *not* provide AT&T.[204] And, while FPL questions whether AT&T in fact incurs the cost to perform the work itself,[205] this unsupported conjecture does not rebut the

---

Kennedy in Support of FPL's Comments, P.E. W.C. Dkt. 07-245 (Apr. 22, 2008) at ¶ 4 ("FPL … rarely receives complaints about the length of time taken to complete a make-ready job.").

[198] Reply Ex. C at ATT00977-78 (Peters Reply Aff. ¶ 30).

[199] *See In Re Rust Craft Broad. Co., Steubenville, Ohio*, Petition for Reconsideration, 68 FCC 2d 1013, 1016 (1978).

[200] *Id.*; Answer Ex. A at FPL00010 (Kennedy Decl. ¶ 15); *see also* FPL's Answer to Verizon's Interrog. No. 6, publicly filed as Verizon's Public Reply Ex. 5, *Verizon Fla. LLC v. Fla. Power & Light Co.*, Dkt. No. 15-73, File No. EB-15-MD-002 (showing that FPL historically charged lower permit fees).

[201] Answer Ex. A at FPL00010 (Kennedy Decl. ¶ 15).

[202] *See* Kennedy 2010 Comments Decl. ¶ 12.

[203] *See* Decl. of Thomas J. Kennedy, P.E. in Support of FPL's Reply Comments, W.C. Dkt. No. 07-245 (Oct. 4, 2010) at ¶ 2 ("The percentage of FPL poles which require electric supply space make ready is approximately 10%.").

[204] *See* Answer Ex. A at FPL00010 (Kennedy Decl. ¶ 15).

[205] *See id.*

presumption or undermine the contrary sworn testimony from AT&T.[206] FPL cannot "'embed in [AT&T's] rental rate [these permit] costs that [FPL] does not incur.'"[207]

Tenth, FPL repeats a prior alleged benefit when it claims that AT&T does not "undergo the same post-inspection process to which other telecom providers are subject."[208] This process is part of the permitting process FPL relied on above and the costs (which FPL does not incur for AT&T) are covered by the same permit fees.[209] But AT&T incurs the cost to perform post-inspection work on its own facilities, just as FPL performs post-inspection work of its facilities on AT&T's poles.[210] There is thus no net advantage to AT&T or any unreimbursed cost that could justify payment of a higher rate to FPL.[211]

Eleventh, FPL argues that AT&T "essentially" avoided the "potential" for a [redacted] unauthorized attachment fee included in some of its license agreements.[212] Of course, this fee is

---

[206] *See, e.g.*, Compl. Ex. C at ATT00068 (Peters Aff. ¶ 9); Reply Ex. C at ATT00969-70 (Peters Reply Aff. ¶ 15).

[207] *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18).

[208] FPL Br. at 57. It is not clear whether FPL completes these post-installation inspections in every instance, [redacted]. *See, e.g.*, Reply Ex. 2 at FPL-000794 (License 2 [redacted]; Reply Ex. 3 at FPL-002807 (License 3 [redacted]; *see also* Reply Ex. 1 at FPL-000210 (License 1 [redacted]); Reply Ex. 4 at FPL-002075 (License 4 [redacted]).

[209] *See* Reply Ex. A at FPL00010 (Kennedy Decl. ¶ 15) (describing fees as covering "permit and post-attachment inspection costs"); FPL's Answer to Verizon's Interrog. No. 6, publicly filed as Verizon's Public Reply Ex. 5, *Verizon Fla. LLC v. Fla. Power & Light Co.*, Dkt. No. 15-73, File No. EB-15-MD-002 (explaining that an inspection fee is a "component" of the non-make-ready and make-ready permit fees); *see also* FPL Br. at 57 ([redacted]).

[210] *See* Reply Ex. C at ATT00978 (Peters Reply Aff. ¶ 32).

[211] *See, e.g.*, *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18).

[212] FPL Br. at 57; Answer Ex. A at FPL00013 (Kennedy Decl. ¶ 18). Some of FPL's license agreements [redacted]. *See, e.g.*, Reply Ex. 2 (License 2).

entirely avoidable by AT&T's competitors as well, as they can simply permit their attachments in advance or correct the issue when notified.[213] And FPL has not produced a single document showing that it has charged any unauthorized attachment fees, or that they have been paid.[214] AT&T, in contrast, *has* paid FPL significant sums in back rent for every new attachment identified in a survey.[215] With JUA rates approaching [redacted] per pole, AT&T has certainly been disadvantaged as compared to a competitor subject to an entirely avoidable one-time [redacted] fee.[216]

Twelfth, FPL makes the bald claim that AT&T saves "approximately 20%" in make-ready costs because it does not pay some undefined and unquantified set of "indirect overhead" involving "administrative and general expenses."[217] FPL cannot rebut the presumption based on such "generalized contentions,"[218] particularly when an allocation of "administrative and general

---

[213] *See Pole Attachment Order*, 26 FCC Rcd at 5291 (¶ 115) (stating that certain specified unauthorized attachment fees would be reasonable if (1) the pole owner provides "specific notice of a violation (including pole number and location) before seeking relief against a pole occupant" and (2) the attacher fails to either submit a plan of correction or correct the violation and provide notice of the correction within certain specified time periods).

[214] *See, e.g.*, Answer Ex. A at FPL00013 (Kennedy Decl. ¶ 18).

[215] *See* Compl. Ex. 2 at ATT00141, ATT00143-44, ATT00147 (charging AT&T back rent for attachments identified in surveys); *see also* Compl. Ex. 1 at ATT00123 (JUA § 10.10) ("The adjustment and the number of attachments shall be deemed to have been made equally over the years elapsed since the preceding inventory. Unless otherwise agreed upon, retroactive billing for the pro-rated adjustment will be added to the normal billing for the year following completion of the field inventory.").

[216] FPL implies that this is an annually recurring [redacted] per pole fee. *See, e.g.*, FPL Br. at 57; Answer Ex. A at FPL00116 (Kennedy Decl., Ex. J). It is not. At most, AT&T's competitors would pay a 1-time [redacted] fee for an isolated unpermitted attachment. *See, e.g.* Reply Ex. C at ATT00968-69 (Peters Reply Aff. ¶ 14 n.17).

[217] FPL Br. at 57-58; *see also* Reply Ex. A at FPL00013, -117 (Kennedy Decl. ¶ 19 & Ex. J).

[218] *See, e.g.*, *In the Matter of Investigation of Special Access Tariffs of Local Exch. Carriers*, 2 FCC Rcd 3507 (1987).

expenses" is already included in a properly calculated new telecom rate.[219] And, in any event, FPL must also receive the same alleged benefit when AT&T performs make-ready at FPL's request, further eliminating the possibility of any net benefit.[220]

Thirteenth, FPL argues that AT&T has received land rights from FPL, but admits AT&T's competitors have comparable rights.[221] FPL claims AT&T saved [redacted] in permit fees for use of the public right of way,[222] but concedes that "[m]ost agencies do *not* charge a permit fee for aerial attachments."[223] FPL also guesses that AT&T saved [redacted] because of FPL's easements,[224] but admits its easements "include easement rights for all carriers providing telecommunications services."[225] FPL's argument thus boils down to speculation that "many telecom carriers have no idea these easements exist" and a guess that

---

[219] *See, e.g.*, *Consolidated Partial Order*, 16 FCC Rcd at 12125 (¶ 44) ("[W]e currently allocate administrative expenses by dividing total administrative and general expenses by net plant investment."); *see also Cavalier Tel., LLC v. Va. Elec. and Power Co*., 15 FCC Rcd 9563, 9574 (¶ 22) (2000), vacated by settlement, 17 FCC Rcd 24414 (2002) ("Because Respondent provided no explanation that the administrative costs … are not otherwise included in the carrying charges, we find that the fees are an unjust and unreasonable rate, term, or condition.").

[220] *See* Reply Ex. C at ATT00971 (Peters Reply Aff. ¶ 18).

[221] *See* Answer Ex. A at FPL00012-13 (Kennedy Decl. ¶ 17); *see also* FPL Br. at 58.

[222] Answer Ex. A at FPL00013 (Kennedy Decl. ¶ 17).

[223] *Id.* (emphasis added).

[224] *Id.* at FPL00012 (Kennedy Decl. ¶ 17). Access to FPL's easements is not guaranteed under the JUA. *See* Compl. Ex. 1 at ATT00120 (JUA § 7.2) ("While the Owner and the Licensee will cooperate as far as may be practicable in obtaining rights-of-way for both parties of joint use poles, no guarantee is given by the Owner of permission from property owners, municipalities or others for use of poles and right-of-way easement by the Licensee.").

[225] Answer Ex. A at FPL00012 (Kennedy Decl. ¶ 17). FPL's valuation for this alleged benefit is pure speculation based on an improper assumption that AT&T, as an attacher, would be acquiring the first easement for the particular property. *Id.* But if AT&T required an easement for an attachment, FPL would have already obtained an easement for the pole. And so any "value" would be the far lower "difference in value of the land before and after the second easement." *Cordones v. Brevard Cnty*., 781 So. 2d 519, 524 (Fla. Dist. Ct. App. 2001).

easements for "communications purposes" may not apply to cable companies.[226] This is no reason to inflate AT&T's rental rate. FPL's easements treat AT&T the same as "telecommunications carriers [and] cable television systems providing telecommunications services on the same poles."[227] They do not rebut the new telecom rate presumption.[228]

Fourteenth, FPL argues that AT&T may take ownership of a joint use pole when FPL abandons it.[229] FPL assigns no "specific dollar value" to this allegation[230] and does not identify any poles abandoned by FPL that AT&T has sought to take ownership. Moreover, some of AT&T's competitors [redacted][231] and FPL enjoys the reciprocal right with respect to poles abandoned by AT&T.[232] This is not a net benefit.

Fifteenth, FPL notes that AT&T is able to use FPL's common grounding pole bond,[233] but admits the bond "may also meet the requirements of other telecom providers."[234] FPL thus claims only that, if additional bonding were required, it would charge AT&T's competitors for the work.[235] FPL provides no evidence that any attacher has required additional bonding, which

---

[226] Answer Ex. A at FPL00012 (Kennedy Decl. ¶ 17). Although FPL did not attach easements or explain why it thinks they exclude cable companies, it previously argued that easements covering "communications purposes" do not reach cable television. *See* FPL's Public Resp. to Verizon Fla.'s Pole Attachment Compl. at 19, Dkt. No. 15-73 (June 29, 2015).

[227] 47 C.F.R. § 1.1413(b).

[228] *Id.*; *see also* Reply Ex. A at ATT00932-34 (Rhinehart Reply Aff. ¶¶ 41-42).

[229] FPL Br. at 58.

[230] *See* Answer Ex. A at FPL00013-14 (Kennedy Decl. p. 12 & ¶ 22).

[231] *See* Reply Ex. 3 at FPL-002813 (License 3 [redacted]); Reply Ex. 4 at FPL-002080-81 (License 4 [redacted]).

[232] Compl. Ex. 1 at ATT00121 (JUA, Art. IX).

[233] FPL Br. at 59.

[234] Answer Ex. A at FPL00014 (Kennedy Decl. ¶ 23).

[235] FPL Br. at 59.

is unlikely since each attacher on a pole must attach to the same ground bond for safety purposes.[236] Nor has FPL shown that it has performed any such work and charged for it.[237] Perhaps this is the reason why FPL withdrew the identical argument from its prior pole attachment complaint proceeding.[238]

Sixteenth, FPL argues that AT&T does not need to "carry insurance to indemnify FPL and name it as an additional insured" or post a security bond.[239] But the vast majority of FPL's license agreements [redacted].[240] [redacted],[241] which AT&T covered long ago in higher rental rates. In any event, these provisions are reciprocal. AT&T and FPL are covered by the same liability provision; neither is contractually required to purchase insurance; and each has waived the security bond requirement.[242] AT&T does not receive a net benefit that justifies a higher rate.[243]

Seventeenth, FPL claims that AT&T has been advantaged by the installation of "stronger concrete poles."[244] But AT&T's competitors also attach to FPL's concrete poles, and FPL is

---

[236] Reply Ex. C at ATT00978 (Peters Reply Aff. ¶ 31).

[237] *See, e.g.*, Answer Ex. A at FPL00014 (Kennedy Decl. ¶ 23).

[238] *See* Verizon Fla.'s Public Reply in Support of Its Pole Attachment Compl. against FPL, Ex. 8 at 2, Dkt. No. 15-73 (Nov. 24, 2015).

[239] FPL Br. at 59; Answer Ex. A at FPL00014 (Kennedy Decl. ¶¶ 24, 26). While FPL claims that the security bond would "cover the cost of removal of their facilities," AT&T's competitors have a statutory right to remain attached to FPL's poles. *See* 47 U.S.C. § 224(f).

[240] Reply Ex. C at ATT00967-68 (Peters Reply Aff. ¶ 12).

[241] *See, e.g.*, Reply Ex. 1 at FPL-000216 (License 1 [redacted]).

[242] *See* Compl. Ex. 1 at ATT00125-26 (JUA Art. XIII); Reply Ex. C at ATT00967-68 (Peters Reply Aff. ¶ 12); Reply Ex. D at ATT01004-05 (Dippon Reply Aff. ¶ 46).

[243] *See* Reply Ex. C at ATT00979 (Peters Reply Aff. ¶ 35); Reply Ex. D at ATT01004-05 (Dippon Reply Aff. ¶ 46).

[244] FPL Br. at 59.

fully compensated for their costs at the new telecom rental rate.[245] FPL cannot credibly claim that it requires [redacted] times that rate from AT&T. Nor can it establish that it is installing concrete poles *because* of AT&T.[246] FPL measured AT&T's facilities and found that they occupy comparable space to that required by AT&T's competitors.[247] Neither their size nor "girth" requires concrete poles.[248] FPL has instead replaced and "reinforce[d] existing utility poles with stronger wood or concrete poles" in order to "strengthen[ ] *the electric grid*."[249]

Eighteenth, FPL contends that the JUA benefits AT&T by requiring FPL to cover some of the cost for AT&T to build a new pole line for AT&T's facilities if FPL builds a transmission line over an existing FPL distribution pole line.[250] But, even if true, this provision of the JUA does not create a material benefit relative to AT&T's competitors because, as FPL acknowledges, AT&T, like its competitors, could simply attach to the new transmission pole line.[251] FPL also does not allege that this has ever occurred, does not assign a "specific dollar value" to this allegation, and does not explain how the possibility that FPL could redesign its

[245] *See* 18 C.F.R. Pt. 101 (stating that Account 364 includes "[p]oles, wood, steel, concrete, or other material"); *Consolidated Partial Order*, 16 FCC Rcd at 12176 (App. E-2) (including investment in Account 364 in new telecom rate calculation); *Pole Attachment Order*, 26 FCC Rcd at 5321 (¶ 183 n.569) (finding new telecom rate "fully compensatory").

[246] *See* FPL Br. at 59; Answer Ex. A at FPL00014 (Kennedy Decl. ¶ 25).

[247] *See* Answer Ex. E at FPL00166 (Murphy Decl. ¶ 3).

[248] FPL Br. at 59; Answer Ex. A at FPL00014 (Kennedy Decl. ¶ 25).

[249] *See* Reply Ex. 6 (FPL installs new poles to strengthen electric grid and help communities prepare for hurricane season) (emphasis added).

[250] FPL Br. at 59-60; Answer Ex. A at FPL00014 (Kennedy Decl. ¶ 27).

[251] FPL Br. at 59-60; Answer Ex. A at FPL00014 (Kennedy Decl. ¶ 27).

network in a way that imposes costs on AT&T should nonetheless result in AT&T paying a higher rental rate to FPL.[252] This speculation does not amount to a net benefit to AT&T.

3. AT&T's "Voluntary" Pole Access Cannot Support A Higher Rate.

Having unsuccessfully scoured the JUA for any possible advantage, FPL recasts its arguments into a claim that the JUA itself is the benefit because it provides AT&T with "voluntary access" to FPL's poles.[253] In FPL's view, because AT&T does not have a statutory right of access to FPL's poles, the JUA allowed AT&T to "avoid the cost of building an entire network on its own."[254] FPL's argument is no more valid argued in this manner. It also fails as a matter of law.

A JUA that provides AT&T with "voluntary access" to FPL's poles is not a net material competitive benefit that can rebut the new telecom rate presumption because other attachers have the same or superior access. As the Commission has concluded, "excess, unused pole attachment space, is the same whether the attachment is obtained through voluntarily signed contracts or through mandatory access."[255] For that reason, FPL must prove that AT&T "receives significant material benefits beyond basic pole attachment or other rights given to another telecommunications attacher."[256] And, as already demonstrated, FPL cannot make that showing. An ILEC's lack of a statutory right of access cannot justify a higher rate.

---

[252] FPL Br. at 59-60; Answer Ex. A at FPL00013-14 (Kennedy Decl. at page 12 & ¶ 27).

[253] FPL Br. at 60-63.

[254] *Id.* at 62.

[255] *Ala. Cable Telecomms. Ass'n*, 16 FCC Rcd at 12232 (¶¶ 51-52).

[256] *Third Report and Order*, 33 FCC Rcd at 7771 (¶ 128).

Nor can the fact that the JUA provided AT&T access to FPL's poles in 1975, years before the 1996 Telecommunications Act introduced competition to the market.[257] The Commission would not have adopted a presumption if it could be rebutted in every case by an immutable difference between ILECs and CLECs.[258] And, in any event, even in the early years of the 1975 JUA, AT&T's "voluntary access" to FPL's poles was not unique. Before 1996, all access to access to utility poles was voluntary.[259] Yet, cable companies were in the market and attaching to poles, including those of FPL, when the JUA was signed in 1975.[260] Thus, AT&T's "voluntary access" to FPL's poles is not as unique or beneficial as FPL suggests and that access does not rebut the new telecom rate presumption.[261]

D. FPL Cannot Lawfully Charge The JUA Rates Under The 2011 *Pole Attachment Order* Either.

Without evidence that can rebut the new telecom rate presumption, FPL relies almost exclusively on arguments that the 2011 *Pole Attachment Order* applies and precludes any rental

---

[257] *See* FPL Br. at 63.

[258] *See Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126).

[259] Cable companies have enjoyed the right to "just and reasonable" rates since 1978. *See, e.g., FCC v. Fla. Power Corp*., 480 U.S. 245, 247-48 (1987) ("*Fla. Power Corp*."); *see also Gulf Power Co. v. United States*, 187 F.3d 1324, 1326-27 (11th Cir. 1999).

[260] *See, e.g., Fla. Power Corp*., 480 U.S. at 247 (For "the past 30 years, utility companies throughout the country have entered into arrangements for the leasing of space on poles to operators of cable television systems."); S. Rep. 95-580, 95th Cong., 1st Sess. 1977, 1978 U.S.C.C.A.N. 109, 120 ("It is the general practice of the cable television (CATV) industry in the construction and maintenance of a cable system to lease space on existing utility poles for the attachment of cable distribution facilities."); Answer Ex. A at FPL00052-53 (Kennedy Decl., Ex. E at Art. XV) (The parties' 1961 agreement refers to the "[e]xisting rights of other parties" on the joint use poles."); Compl. Ex. 1 at ATT00127 (JUA § 14.2) (The JUA accommodates the "[e]xisting rights of other parties.").

[261] *Third Report and Order*, 33 FCC Rcd at 7771 (¶ 128).

relief.[262] These arguments are irrelevant because they speak to the wrong standard given the applicability of the 2018 *Third Report and Order*. They are also incorrect.

1. Existing JUAs Are Subject To Challenge Under The 2011 *Order*.

FPL first argues that the JUA should not be subject to *any* review because the 2011 *Order* applies only to "new agreements."[263] The 2011 *Order* says otherwise and establishes a framework for reviewing agreements that pre-date the *Order*.[264] The Commission confirmed this in FPL's last rate dispute, which also involved a 1975 joint use agreement.[265] It then explained that the Commission has "on many occasions" substituted a just and reasonable rate for an agreed upon unjust and unreasonable rate.[266] And indeed, "pole attachment rates cannot be held reasonable simply because they have been agreed to."[267] "The Commission has a duty under section 224 to 'adopt procedures necessary and appropriate to hear and resolve complaints concerning … rates, terms, and conditions' of pole attachment pursuant to the requirements of section 224. The Commission would not be fulfilling that duty if it were to substitute the requirements of contract law for the dictates of section 224."[268] Thus, AT&T need not "pay the relatively high Agreement Rates for as long as its attachments remain on Florida Power's poles" simply because the JUA predates the 2011 *Order*.[269]

---

[262] FPL Br. at 34-70.

[263] *Id.* at 34-35.

[264] *Pole Attachment Order*, 26 FCC Rcd at 5335 (¶ 216).

[265] *FPL Order*, 30 FCC Rcd at 1143 (¶ 9).

[266] *Id.* at 1147 (¶ 19 n.61) (citing cases).

[267] *Selkirk Commc'ns, Inc. v. Fla. Power & Light Co*., 8 FCC Rcd 387, 389 (¶ 17) (1993).

[268] *Pole Attachment Order NPRM*, 25 FCC Rcd at 11908 (¶ 105) (cited with approval at *Pole Attachment Order*, 26 FCC Rcd at 5292 (¶ 119 n.368)).

[269] *FPL Order*, 30 FCC Rcd at 1150 (¶ 25).

2. FPL's Answer Evidences Its Use Of Its Pole Ownership Advantage To Impose Unjust And Unreasonable Rates.

FPL has a 2-to-1 (67% to 33%) pole ownership advantage over AT&T[270] and its witness says "pole ownership means bargaining power."[271] Rate relief is therefore appropriate under the 2011 *Order*.[272] FPL tries six different ways to avoid that fact,[273] but each lacks merit.

First, FPL argues that a pole ownership disparity should not be considered indicative of bargaining leverage because, absent joint use, FPL would also have to find alternate infrastructure for joint use poles owned by AT&T.[274] The Commission rejected this argument based on "[s]tandard economic theories."[275] And FPL proves the Commission was correct, as it admits that, absent FCC regulation of rates, it has leverage to impose rates on AT&T up to the cost of "building [AT&T]'s own pole line, undergrounding its own facilities or establishing a wire[line] network on non-FPL facilities."[276] That is the definition of bargaining leverage.[277]

Second, FPL argues that if pole ownership numbers are considered, FPL owned 59.4% of the joint use poles in 1975, and so was shy of the 65% ownership advantage the Commission previously found justifies rate relief.[278] But the Commission did not limit rate relief to

---

[270] *See* Compl. ¶ 23; Answer ¶ 23 ("FPL admits that the relative pole ownership percentages supplied by AT&T in paragraph 23 are accurate.").

[271] Answer Ex. A at FPL00004 (Kennedy Decl. ¶ 8).

[272] *See Pole Attachment Order*, 26 FCC Rcd at 5334 (¶ 215).

[273] FPL Br. at 35-41.

[274] FPL Br. at 36-37; *see also* Answer ¶ 23.

[275] *See Pole Attachment Order*, 26 FCC Rcd at 5329 (¶ 206 n.618) (explaining why a pole ownership disparity provides leverage under "[s]tandard economic theories").

[276] FPL Br. at 48.

[277] Reply Ex. D at ATT01005-07 (Dippon Reply Aff. ¶¶ 48-52).

[278] FPL Br. at 36; *see also Pole Attachment Order*, 26 FCC Rcd at 5329 (¶ 206).

agreements entered decades ago at some specified ownership level; it simply acknowledged that, if "[I]LECs owned approximately the *same number* of poles as electric utilities *and* were able to ensure just and reasonable rates, terms, and conditions" through negotiations, such rates *may* remain "just and reasonable."[279] AT&T never owned the "same number" of poles as FPL[280] and the rates are manifestly *not* just and reasonable.[281] But more importantly, the Commission sought to provide rate relief where, as here, "[o]ver time, aggregate [I]LEC pole ownership has diminished relative to that of electric utilities."[282] AT&T's ownership ratio has "declined … primarily due to FPL's FPSC-ordered storm hardening initiatives,"[283] creating a 2-to-1 pole ownership advantage today that justifies rate relief.[284]

Third, FPL argues that AT&T had "bargaining power" in 1975 because AT&T "clearly and successfully negotiated the agreement it desired,"[285] including a "major change in cost allocation."[286] This is laughable.[287] The "major change" FPL relies on is the allocation of 47.4% of pole costs to AT&T, and 52.6% to FPL, to set the rental rate when the prior agreement had

---

[279] *See Third Report and Order*, 33 FCC Rcd at 7768 (¶ 124) (describing *Pole Attachment Order*) (emphases added).

[280] *Id*.

[281] *See* Compl. ¶¶ 21-22; *see also* Section II.C, below.

[282] *Pole Attachment Order*, 26 FCC Rcd at 5328-29 (¶ 206).

[283] Answer Ex. A at FPL00004, FPL00025 (Kennedy Decl. ¶ 8 & Ex. A).

[284] *Dominion Order*, 32 FCC Rcd at 3757 (¶ 13) ("nearly two-to-one pole ownership advantage"); *see also Pole Attachment Order*, 26 FCC Rcd at 5329 (¶ 206) (estimating that electric utilities "own approximately 65-70 percent of poles").

[285] FPL Br. at 37-39.

[286] FPL Br. at 5.

[287] AT&T did not even negotiate the JUA, which FPL admits was entered by AT&T's predecessor Southern Bell Telephone and Telegraph Company about 10 years before FPL hired its fact witness. *See id*. at 1; *see also* Answer Ex. A at FPL00002 (Kennedy Decl. ¶ 4).

allocated 50% to each.[288] This modest change had about a [redacted] per pole impact on the rates AT&T paid for wood distribution poles over the last 5 years; in other words, AT&T's rates were about [redacted], instead of [redacted], more per wood distribution pole than the new telecom rates applicable to its competitors.[289] And FPL itself admits that the space allocations do not reflect reality: "AT&T's and FPL's use of pole infrastructure is not comparable. They … are not attaching the same type of equipment to poles; they do not have the same space requirements."[290] Best case scenario, AT&T uses 1.18 feet of space, while FPL requires at least 10.5 feet.[291] The immateriality of the change AT&T's predecessor obtained in 1975 thus confirms rather than refutes FPL's use of its pole ownership advantage to impose unjust and unreasonable rates.[292]

Fourth, FPL claims that "the parties' recent conduct shows that there has been no exertion of bargaining power by FPL."[293] This too is laughable, as FPL's recent activity screams otherwise. FPL terminated the JUA because AT&T asked for "just and reasonable" rates,[294] wants to "remove AT&T's equipment from FPL's infrastructure,"[295] and continues to press

---

[288] FPL Br. at 5; *see also id.* at 38.

[289] *See* FPL's Resp. to AT&T's Interrog. No. 5; Compl. Ex. A at ATT00008-09 (Rhinehart Aff. ¶ 16).

[290] Answer ¶ 22.

[291] *See* Answer Ex. D at FPL00164 (Deaton Decl., Ex. RBD-1) (10.5 feet for FPL); Answer Ex. E at FPL00166 (Murphy Decl. ¶ 3) (1.18 feet for AT&T); *see also* Reply Ex. 3 at FPL-002803 (License 3[redacted]) ([redacted]).

[292] *See* Reply Ex. A at ATT00934-35 (Rhinehart Reply Aff. ¶ 43); Reply Ex. D at ATT00997-98 (Dippon Reply Aff. ¶ 36).

[293] FPL Br. at 39-40.

[294] Answer ¶ 17 (admitting FPL terminated the JUA because of the parties' rate dispute).

[295] *Id.*; *see also id.* ¶ 12 ("FPL lacks the contractual ability to terminate AT&T's license with respect to any existing joint use poles (even for AT&T's failure to provide any payments under the agreement for two years)").

ahead with its "collection efforts" in Florida federal court even though AT&T paid the disputed invoices in full several months ago and before FPL even served its complaint.[296]

FPL attributes significance to a claim that it "offered to purchase AT&T's poles and negotiate attachment rates and arrangements that would be comparable to what FPL provides to non-ILECs."[297] FPL does not provide a single piece of paper substantiating this offer, proposing a price for the poles, or offering new telecom rates in exchange for the sale. For good reason. FPL's witness admits that a pole purchase was just an "idea" he raised.[298] He also notes that AT&T expressed a willingness to consider an offer if one were extended so long as FPL *also* offered "lower attachment rates" comparable to those charged "other telecom providers."[299] FPL would not commit to do so, stating only "that all these things could be considered and addressed" later.[300] But FPL never did extend a formal offer to purchase poles *or* lower rental rates.[301] Instead, FPL refused to negotiate a different rate, claiming, despite the *Pole Attachment Order* and the unambiguous language in the *Third Report and Order*, that it is "not aware of any federal law that requires FPL to take affirmative action to change an agreed upon contract rate."[302] And,

---

[296] *See* Answer ¶ 17; FPL Br. at 13; *see also* ATT00716, ATT00719, ATT00721.

[297] FPL Br. at 40.

[298] Answer Ex. A at FPL00020 (Kennedy Decl. ¶ 36). Mr. Kennedy also apparently confuses AT&T with its wireless affiliate, as AT&T does not own wireless "towers," and so would not refer to them in a conversation about utility poles.

[299] *Id.*

[300] *Id.*

[301] *See also* Reply Ex. C at ATT00965 (Peters Reply Aff. ¶ 8).

[302] Compl. Ex. 10 at ATT00188 (Email from M. Jarro, FPL to D. Miller, AT&T (Dec. 4, 2018)); *see also* Compl. Ex. 12 at ATT00197 (Email from M. Jarro, FPL to D. Miller, AT&T (Dec. 20, 2018) ("Also, as we have previously communicated, there is nothing in the 2011 FCC Order that affirmatively requires the parties to modify an existing agreed upon contract rate.").

in any event, FPL's entire argument about a possible purchase of AT&T's poles is irrelevant because AT&T does not need to sell poles in order to secure the "just and reasonable" rate for use of FPL's poles that is guaranteed by federal law.

Fifth, FPL argues that AT&T must have bargaining power to negotiate just and reasonable rates because its parent is "the largest telecommunications provider in the world."[303] But AT&T's position as a telecommunications provider provides no leverage in negotiations over use of utility poles. Instead, the Commission rightly looks to pole ownership counts and the resulting rental rates in this context because "exclusive control over access to pole lines … unquestionably" places FPL in a position to charge unreasonably high pole attachment rates.[304]

Sixth, FPL argues that AT&T "is, and always has been, free to install its own poles as it enters new service areas."[305] If true,[306] it proves why rate relief is so needed. "Given the benefits of pole attachments to minimize 'unnecessary and costly duplication of plant for all pole users,'" Congress directed the Commission to ensure "just and reasonable" pole attachment rates.[307] FPL cannot perpetuate its far higher JUA rates by arguing that AT&T could incur even higher costs to deploy an unwanted duplicative network.[308]

---

[303] FPL Br. at 39.

[304] *See Pole Attachment Order*, 26 FCC Rcd at 5242, 5329 (¶¶ 4 & 206 n.618) (internal quotations omitted); *see also id.* at 5329 (¶ 206) (stating that an ILEC's "historical monopoly over local telephone service has not always translated into marketplace power").

[305] FPL Br. at 41.

[306] *See Pole Attachment Order*, 26 FCC Rcd at 5242 (¶ 4) ("Congress concluded that [o]wing to a variety of factors, including environmental or zoning restrictions and the very significant costs of erecting a separate pole network or entrenching cable underground, there is often no practical alternative [for network deployment] except to utilize available space on existing poles." (internal quotations omitted)).

[307] *Id.* (quoting S. Rep. No. 580, at 13 (1977), *reprinted in* 1978 U.S.C.C.A.N. 109, 121).

[308] *See* Reply Ex. D at ATT00987, ATT00997 (Dippon Reply Aff. ¶¶ 12, 34-35).

3. FPL's Other Efforts To Justify Its Rates Under The 2011 *Order* Fail.

FPL makes five additional arguments in its effort to avoid the rate reductions intended by the 2011 *Pole Attachment Order*. They fail also.

First, FPL argues that AT&T does not "genuinely lack[] the ability to terminate" the JUA rates and obtain new ones.[309] The Enforcement Bureau decided this against FPL in its last rate dispute, relying on an evergreen clause that, like the clause in the JUA, requires payment of the JUA rates after termination as evidence that rate relief was justified because the ILEC "genuinely lacks the ability to terminate an existing agreement.'"[310] The same is true here, where FPL informed AT&T that nothing "requires [FPL] to modify an existing agreed upon contract rate.[311] FPL now claims AT&T *may* have been able to negotiate a new agreement, but only if AT&T had "follow[ed] up" on FPL's "idea" to buy all of AT&T's poles, something that, by definition, would have further *reduced* AT&T's leverage.[312] But this is pure litigation positioning. During negotiations, FPL flatly refused to "take affirmative action to change an agreed upon contract rate."[313] Simply put, AT&T had no real ability to terminate the JUA or to negotiate new, reasonable attachment rates.

Second, FPL argues that the disparity between the rates paid by AT&T and FPL must not be as bad as the "significant disparity" considered in the *Dominion Order* because, in 2017, FPL

---

[309] FPL Br. at 41 (quoting *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 216)).

[310] *FPL Order*, 30 FCC Rcd at 1150 (¶ 25) (quoting *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 216)).

[311] Compl. Ex. 12 at ATT00197 (Email from M. Jarro, FPL to D. Miller, AT&T (Dec. 20, 2018) ("Also, as we have previously communicated, there is nothing in the 2011 FCC Order that affirmatively requires the parties to modify an existing agreed upon contract rate.").

[312] FPL Br. at 41-42.

[313] Compl. Ex. 10 at ATT00188 (Email from M. Jarro, FPL to D. Miller, AT&T (Dec. 4, 2018)).

paid AT&T a rate that was [redacted] per pole higher than the rate AT&T paid FPL.[314] But FPL *should* pay a higher rate, as it uses substantially more pole space—10.5 feet compared to AT&T's use of, at most, only 1.18 feet of space.[315] Yet the rate that FPL charges AT&T is relatively close to the rate that FPL pays AT&T because the JUA divides pole costs nearly in half—47.4% to AT&T for a wood distribution pole versus 52.6% for FPL.[316] The Commission instead expected that ILECs and electric utilities would each pay "roughly the same proportionate rate given the parties' relative usage of the pole 'such as the same rate per foot of occupied space.'"[317]

Third, FPL argues that AT&T failed to meet its burden under the 2011 *Pole Attachment Order* to "demonstrate that the [JUA] at issue does not provide a material advantage … relative to cable operators or telecommunications carriers."[318] But AT&T provided substantial evidence, testimony, and argument that more than satisfies its burden under Commission rules.[319] Thus,

---

[314] *Id.* at 43; *see also* Compl. Ex. B at ATT00052 (Miller Aff. ¶ 28) (showing that AT&T paid [redacted] per wood distribution pole for 2017, while FPL paid [redacted] per pole).

[315] *See* Answer Ex. D at FPL00164 (Deaton Decl., Ex. RBD-1) (10.5 feet for FPL); Answer Ex. E at FPL00166 (Murphy Decl. ¶ 3) (1.18 feet for AT&T).

[316] *See, e.g.*, FPL Br. at 38; *see also* Compl. Ex. B at ATT00052 (Miller Aff. ¶ 28) (showing that AT&T paid a [redacted] per wood distribution pole for 2017, while FPL paid [redacted] per pole).

[317] *See Dominion Order*, 32 FCC Rcd at 3760 (¶ 21 n.78) (quoting *Pole Attachment Order*, 26 FCC Rcd at 5337 (¶ 218 n.662)).

[318] *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217); *see also* FPL Br. at 44-46.

[319] *See* 47 C.F.R. § 1.1406(a) ("The complainant shall have the burden of establishing a *prima facie* case that the rate, term, or condition is not just and reasonable."); *Multimedia Cablevision, Inc. v. Sw. Bell Tel. Co*., 11 FCC Rcd 11202, 11207 (¶ 11) (1996) (finding a *prima facie* case is established by "a statement of the specific unreasonable pole attachment rate, term or condition and all arguments used to support its claim of unreasonableness."); *see also, e.g*., *Cable Television Ass'n of Ga. v. Ga. Power Co*., 18 FCC Rcd 16333, 16337 (¶ 8) (2003) (finding *prima facie* case where Complaint "could have been more detailed," but nonetheless "identifie[d] the factual basis of the allegations"); *Fla. Cable Telecomms. Ass'n*, 18 FCC Rcd at 9605-06 (¶ 13) (finding *prima facie* case where Complaint alleged that a rate proposal was significantly higher

the question is whether FPL has justified the JUA rates regardless of whether they are reviewed under the standard adopted in 2011 or 2018.[320] It has not.

Indeed, FPL's defense of the JUA rates for wood and concrete distribution poles (near-[redacted] per wood pole and near-[redacted] per concrete pole) is that the wood distribution pole rate is less than pre-existing telecom rates it claims are as high as [redacted] per pole.[321] But, these inflated pre-existing telecom rates of up to [redacted] per pole are incorrectly calculated.[322] The pre-existing telecom rate for wood and concrete poles can only be about $25 per pole, at most, as by rule the pre-existing telecom rate is about 1.5 times the $16 per pole new telecom rate that FPL charged AT&T's competitors.[323] In comparison, the near-[redacted] and near-[redacted] per pole rates that FPL charges AT&T are exorbitant.[324] The following table shows the pre-existing telecom rates that FPL should have calculated using the new telecom rates it charged AT&T's competitors for use

---

than the Commission's cable rate); *Time Warner Entm't*, 14 FCC Rcd at 9150-51 (¶ 3) (finding *prima facie* case because "Complaint contains information required under Section 1.1404(a-g), although [respondent] disputes the accuracy of some of the information"); *Selkirk Commc'ns*, 8 FCC Rcd at 389 (¶ 17) (finding *prima facie* case where Complaint alleged that licensee was "required to pay a rate … that is higher than the regulated rate … for traditional cable attachments").

[320] *See Dominion Order*, 32 FCC Rcd at 3759-61 (¶¶ 20-22 & n.70) (requiring electric utility to justify its rates); *see also Knology, Inc. v. Ga. Power Co*., 18 FCC Rcd 24615, 24635 (¶ 49) (2003) ("[A]fter [the complainant] establishes a *prima facie* case regarding specific accounts, [the respondent] must produce evidence explaining the challenged charges."); *Marcus Cable Assocs., LP v. Tex. Utils. Elec. Co*., 18 FCC Rcd 15932, 15938-39 (¶ 13) (2003) ("Once a complainant in a pole attachment matter meets its burden of establishing a *prima facie* case, the respondent bears a burden to explain or defend its actions."); *Selkirk Commc'ns*, 8 FCC Rcd at 389 (¶ 17) ("Once [a] prima facie showing is made, … the respondent must justify the rate, term or condition alleged in the complaint not to be just and reasonable." (internal quotation omitted)).

[321] Answer Ex. D at FPL00156 (Deaton Decl. ¶ 9); *see also* FPL Br. at 14, 69; Answer ¶¶ 21, 38.

[322] Reply Ex. A at ATT00916-23 (Rhinehart Reply Aff. ¶¶ 8-20).

[323] *See, e.g.*, *id*. at ATT00916-17 (¶ 8).

[324] FPL's Resp. to AT&T's Interrog. No. 5.

of wood and concrete distribution poles as compared to the JUA rates FPL charged AT&T for the use of the same poles:

Comparison of per-pole rates	2014	2015	2016	2017	2018
Pre-existing telecom rate converted from new telecom rates FPL charged[325]	$15.82	$17.48	$19.61	$22.48	$25.53
Rate FPL charged AT&T (wood)	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Effective rate FPL charged AT&T (concrete)	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

Even under these most-favorable to FPL circumstances, the rates FPL charged AT&T are unlawful, as they far exceed the "hard cap" set by the *Third Report and Order* and the "reference point" set by the *Pole Attachment Order*.[326]

Fourth, FPL argues that the Commission should "decline to disturb" the JUA rates under the 2011 *Order* based on the same non-offer that FPL thought about making to purchase AT&T's poles.[327] But there was no offer. And so the argument has no more merit when repeated in this context.

Fifth, FPL relies on the 18 alleged benefits detailed above as justification for its rates, but they are no more persuasive under the standard adopted in 2011.[328] Because AT&T attaches to FPL's poles based on "terms and conditions that leave it 'comparably situated' to [C]LEC or

[325] These rates are themselves unlawfully inflated, as the properly calculated pre-existing telecom rates are $15.84, $16.85, $18.37, $20.18, and $23.94 per pole for the 2014 to 2018 rental years. *See* Reply Ex. A at ATT00916-17, ATT00923 (Rhinehart Reply Aff. ¶¶ 8, 20).

[326] *See Third Report and Order*, 33 FCC Rcd at 7771 (¶ 129); *Pole Attachment Order*, 26 FCC Rcd at 5336-37 (¶ 218).

[327] FPL Br. at 46-47; *see also* Reply Ex. C at ATT00965 (Peters Reply Aff. ¶ 8).

[328] FPL Br. at 47-67; *see* Section II.C.2, above.

cable attachers, 'competitive neutrality counsels in favor of affording [AT&T] *the same rate* as the comparable provider,' *i.e.*, the New Telecom Rate."[329]

E. AT&T Should Be Awarded A Properly Calculated Per-Pole New Telecom Rate Effective As Of The 2014 Rental Year.

Because FPL has not identified any material advantages that AT&T enjoys over its competitors, much less a net material advantage, AT&T should be charged a properly calculated new telecom "rate determined in accordance with [47 C.F.R.] § 1.1406(e)(2),"[330] and FPL should be ordered to refund the amounts it collected from AT&T in violation of federal law, plus interest, during the applicable 5-year statute of limitations period.[331] During the 2014 through 2018 rental years, the new telecom rates for AT&T's use of FPL's poles were $10.46, $11.12, $12.12, $13.32, and $15.80 per pole, respectively.[332] FPL argues for higher rental rates and a shorter statute of limitations,[333] but its arguments conflict with Commission precedent.

1. FPL's Rate Calculations Are Unlawfully Inflated.

FPL asks for rates that were *not* calculated "in accordance with [47 C.F.R.] § 1.1406(e)(2)" as required.[334] FPL admits that it has been charging AT&T's competitors a new telecom rate in the $10 to $17 range.[335] But FPL argues that if it is forced to charge AT&T

---

[329] *FPL Order*, 30 FCC Rcd at 1142 (¶ 7) (quoting *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217)).

[330] 47 C.F.R. § 1.1413(b).

[331] 47 C.F.R. § 1.1407(a).

[332] Compl. Ex. A at ATT00008 (Rhinehart Aff. ¶ 14); Reply Ex. A at ATT00923 (Rhinehart Reply Aff. ¶ 20).

[333] FPL Br. at 14 n.50, 68-70, 74-75; Answer ¶ 32.

[334] 47 C.F.R. § 1.1413(b); *see also* Reply Ex. A at ATT00915-24 (Rhinehart Reply Aff. ¶¶ 7-21).

[335] FPL charged new telecom rates of $10.44, $11.54, $12.94, $14.84, and $16.85 for the 2014 to 2018 rental years. *See* FPL's Resp. to AT&T's Interrog. No. 5.

under the new telecom rate formula, the rate for AT&T should be up to [redacted] higher.[336] FPL's tailor-made rates for AT&T must be rejected. AT&T is entitled to a competitively neutral rate calculated "in accordance with [47 C.F.R.] § 1.1406(e)(2)" because "*greater rate parity* … can energize and further accelerate broadband deployment."[337]

FPL's rate manipulations fall into 5 categories. *First*, FPL assigns AT&T 4.5 feet of space on a pole,[338] even though FPL uses the presumptive 1-foot input for its other communications attachers.[339] FPL arrives at 4.5 feet of space by improperly including 3.3 feet of safety space, which it acknowledges the "Commission's prior order … allocated to the electric utility."[340] FPL argues that this prior Commission order does not apply to ILECs and that AT&T should be allocated the safety space because it is needed solely due to the taller poles FPL installed to accommodate joint use.[341] This argument has been considered and rejected by the

[336] FPL claims AT&T should pay new telecom rates of [redacted] for the 2014 to 2018 rental years. FPL Br. at 74; Answer ¶¶ 13, 19. FPL also inflates its pre-existing telecom rates, claiming that AT&T should pay up to [redacted] per pole for the 2014 to 2018 rental years, even though the new telecom rates FPL charged convert into pre-existing telecom rates no higher than $25.53. *See* FPL Br. at 14, 69; Answer ¶ 21; *see also* Reply Ex. A at ATT00916-17 (Rhinehart Reply Aff. ¶ 8).

[337] 47 C.F.R. § 1.1413(b); *Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126) (emphasis added; internal quotation omitted).

[338] FPL Br. at 70; Answer Ex. D at FPL00153, FPL00162 (Deaton Decl. ¶ 8 & Ex. RBD-1).

[339] FPL's Resp. to AT&T's Interrog. No. 5.

[340] FPL Br. at 70 n.278.

[341] *Id.*; *see also* Answer Ex. A at FPL00016 (Kennedy Decl. ¶ 30 n.26). FPL assumes that AT&T was the first communications attacher on every FPL pole, but cable companies were in the market and attaching to poles when the JUA was signed in 1975. *See Fla. Power Corp*., 480 U.S. at 247 (For "the past 30 years, utility companies throughout the country have entered into arrangements for the leasing of space on poles to operators of cable television systems."); S. Rep. 95-580, 95th Cong., 1st Sess. 1977, 1978 U.S.C.C.A.N. 109, 120 ("It is the general practice of the cable television (CATV) industry in the construction and maintenance of a cable system to lease space on existing utility poles for the attachment of cable distribution facilities.").

Commission. In response to electric utilities' requests to remove the safety space from usable space because it exists solely "to protect attaching entities' workers," the Commission definitively concluded: "It is the presence of the potentially hazardous electric lines that makes the safety space necessary and but for the presence of those lines, the space could be used by cable and telecommunications attachers. The space is usable and is used by the electric utilities."[342] The Commission's reasoning applies no less to poles shared with AT&T than on poles shared with AT&T's competitors.[343] In fact, the "safety space" is rarely even adjacent to AT&T's facilities, which are typically the lowest on the pole, whereas the safety space divides FPL's facilities from the highest communications attachments on the pole.[344]

Second, FPL relies on an unreliable and hurried post-hoc review of 2,000 poles to decrease the average number of attaching entities input from the FCC's presumptive 5 to 2.99 and increase the average amount of space occupied by AT&T from the FCC's presumptive 1 foot to 1.18 feet.[345] FPL's alternate inputs are not valid and "probative direct evidence" sufficient to rebut the Commission's presumptions.[346] FPL admits it "did not have any data to contradict" the FCC's presumptive inputs during the 2014 to 2018 rental years; it cannot create that data now to retroactively inflate rates, especially when its contractor explains that "naturally

---

[342] *Amendment of the Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd 6453, 6467 (¶¶ 21-22) (2000).

[343] *See Consolidated Partial Order*, 16 FCC Rcd at 12130 (¶ 51); *see also* Reply Ex. C at ATT00974 (Peters Reply Aff. ¶ 23).

[344] *See, e.g.*, Reply Ex. C at ATT00974 (Peters Reply Aff. ¶ 23); Reply Ex. D at ATT00993-94 (Dippon Reply Aff. ¶ 27).

[345] FPL Br. at 69-70; *see also* Answer Ex. E at FPL00168 (Murphy Decl. ¶¶ 8-23).

[346] *See In the Matter of Amendment of Rules & Policies Governing the Attachment of Cable Television Hardware to Util. Poles*, 2 FCC Rcd 4387, 4394 (¶ 52 n.27) (1987); *see also Consolidated Partial Order*, 16 FCC Rcd at 12139 (¶ 70).

field conditions can change over that time period."[347] Nor can FPL's new data rebut the Commission's presumptions for future years. FPL's contractor reviewed just 0.5% of FPL's joint use poles, substantially below even the 45% of poles that the Commission has previously considered "incomplete" and insufficient to rebut the presumptive inputs.[348] FPL also improperly developed the project and collected the data without "coordination with" AT&T.[349] And it did not collect complete data: FPL collected data about space occupied by AT&T *without* collecting data about space occupied by FPL,[350] and it collected data about governmental attachers *without* collecting data about all other attachers on the same poles.[351] FPL's proposed input for the average number of attaching entities thus reflects a mishmash of selective data—some collected this year about 2,000 poles and some collected up to 4 years ago about different poles.[352] None of it reflects the "actual" number of entities on any specific pole.[353] And most of it is outdated, collected years ago in "a fast-growing state" with significant ongoing

---

[347] Answer Ex. E at FPL00168 (Murphy Decl. ¶ 12); Answer Ex. F at FPL00262 (Davis Aff. ¶ 4). Indeed, those conditions did change as the contractor found fewer joint use poles in the field than FPL's records showed. *See* Answer Ex. E at FPL00168 (Murphy Decl. ¶ 12).

[348] *Nevada State Cable Television Ass'n v. Nevada Bell*, 13 FCC Rcd 16774 (¶¶ 12-13) (1998); *see also* Reply Ex. C at ATT00975-76 (Peters Reply Aff. ¶ 27).

[349] *See Nevada State Cable Television Ass'n*, 13 FCC Rcd at 16774 (¶ 13); *see also* Answer Ex. E at FPL00168 (Murphy Decl. ¶ 10) (poles were "selected by FPL"); Answer Ex. F at FPL00262 (Davis Decl. ¶ 5) ("I developed a plan….").

[350] *See* Answer Ex. E at FPL00173 (Murphy Decl., Ex. A). In addition, the information about space occupied by AT&T is only accurate to "within one inch," which is material given that FPL asserts that AT&T's facilities deviate just 2 inches from the presumptive input. *See id.* at FPL00169 (Murphy Decl. ¶¶ 14, 16).

[351] *Id.* at FPL00173 (Murphy Decl., Ex. A).

[352] *See, e.g.*, Answer Ex. A at FPL00016 (Kennedy Decl. ¶ 30) (explaining that he "[c]ombin[ed] the results" of the review of 2,000 poles with "results of the five-year rolling survey"); Answer Ex. E at FPL00167 (Murphy Decl. ¶ 6).

[353] *See Consolidated Partial Order*, 16 FCC Rcd at 12139 (¶ 70).

deployment[354] that can increase the number of attaching entities. FPL, therefore, has not rebutted the Commission's presumptive inputs for average number of attaching entities or space occupied.[355]

Third, FPL inappropriately uses the rate of return "applicable to ILECs" instead of its own rate of return.[356] It claims that it has the right to make the substitution because "FPL has no authorized rate of return approved by a Florida Public Service Commission [FPSC] order."[357] But "the weighted average cost of debt and equity is the proper cost of capital figure" even where those figures are no longer announced by a State commission.[358] And, in any event, FPL uses an actual cost of capital figure based on data "specified in settlements approved by the FPSC" and filed with the FPSC to calculate the rates it charges AT&T's competitors.[359] It must use its own rate of return to calculate the rates it charges AT&T.[360]

Fourth, FPL increases its rates by using a lower amount of pole accumulated depreciation than reported in its FERC Form 1.[361] FPL claims to draw the lower figures from an "FPSC Status Report,"[362] but the report is not publicly available, was not attached to FPL's Answer, and

---

[354] Answer Ex. A at FPL00005 (Kennedy Decl. ¶ 9); *see also* Answer Ex. E at FPL00168 (Murphy Decl. ¶ 12) (stating that errors are understandable in survey data that is "3 to 4 years old" because "naturally field conditions can change over that time period").

[355] *See* Reply Ex. D at ATT00993-96 (Dippon Reply Aff. ¶¶ 27-32).

[356] *See* FPL Br. at 70 n.278.

[357] *Id.*; *but see* FPL's Resp. to AT&T's Interrog. No. 9 (stating that FPL's "rate of return for January – May 2014 is specified in the Florida Public Service Commission's (FPSC) order in Docket No. 080677-EI.").

[358] *Multimedia Cablevision, Inc.*, 11 FCC Rcd at 11215 (¶ 36).

[359] *See* FPL's Resp. to AT&T's Interrog. No. 9.

[360] *See* Reply Ex. A at ATT00918-19 (Rhinehart Reply Aff. ¶¶ 12-13).

[361] *See id.* at ATT00918 (¶ 11).

[362] Answer Ex. D at FPL00154, FPL00162 (Deaton Decl. ¶ 8 & Ex. RBD-1).

was not produced to AT&T in response to its interrogatories.[363] FPL, therefore, cannot use this unverifiable data to increase the rates it charges AT&T.[364]

Fifth, FPL asks the Commission to apply new telecom rates on a per-foot basis (*i.e.*, calculate a rate for one foot of space and multiply it by the number of feet of space occupied).[365] This is not the appropriate way to apply the Commission's rate formulas.[366] If valid data shows that a communications attacher occupies more than 1 foot of space, on average, the appropriate way to calculate the rate is to adjust the "space occupied" input in the rate formula to account for that additional space.[367] This manner of calculating the rate complies with the statutory requirement that unusable space on the pole be equally divided among attaching entities—without regard to the amount of pole space occupied.[368] In contrast, calculating rates in the manner suggested by FPL—multiplying a 1-foot rate by the amount of space occupied—overcharges the attacher being charged because it overallocates the unusable space to them. The

---

[363] Reply Ex. A at ATT00918 (Rhinehart Reply Aff. ¶ 11).

[364] *Cf.* 47 C.F.R. § 1.1404(f).

[365] Answer ¶¶ 8, 37.

[366] *See* Reply Ex. A at ATT00923-24 (Rhinehart Reply Aff. ¶ 21). Indeed, FPL's own witness does not calculate rates in the manner that FPL requests. *See* Answer Ex. D at FPL00162, FPL00164 (Deaton Decl., Ex. RBD-1) (calculating rates using the "space occupied" input).

[367] See 47 C.F.R. § 1.1406(d); *see also* Reply Ex. A at ATT00923-24 (Rhinehart Reply Aff. ¶ 21).

[368] 47 U.S.C. § 224(e)(2) (requiring "equal apportionment of [unusable space] costs among all attaching entities"); *see also In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 (¶ 57) (1998) (rejecting proposal "that entities using more than one foot be counted as a separate entity for each foot or increment thereof" because "[w]e are … convinced that the alternative proposal is inconsistent with the plain meaning of Section 224(e) which apportions the cost of unusable space 'under an equal apportionment of such costs among all attaching entities'"); *id*. at 6800 (¶ 45) ("Under Section 224(e)(2), the number of attaching entities is significant because the costs of the unusable space assessed to each entity decreases as the number of entities increases.")

appropriate new telecom rates for AT&T, therefore, are the $10.46, $11.12, $12.12, $13.32, and $15.80 per pole rates properly calculated "in accordance with [47 C.F.R.] § 1.1406(e)(2)."[369]

2. The Applicable Statute Of Limitations In This Case Is 5 Years.

FPL's statute of limitations arguments conflict with precedent as well. *First*, FPL argues that the Commission "expressly foreclosed" refunds in the *Third Report and Order*.[370] Not so. The Commission declined to create a "*right* to refunds," but it did not eliminate its authority to award refunds when appropriate.[371] And, as FPL learned two decades ago, refunds are appropriate when a pole owner charges "unjust and unreasonable" rates in violation of federal law.[372]

Second, FPL asks the Commission to ignore the 5-year statute of limitations that applies to actions involving a Florida contract[373] and instead apply the 2-year statute of limitations of 47 U.S.C. § 415, which bears no relation to this dispute.[374] Section 415 applies only to a carrier action to recover *lawful* charges and to an action against a carrier to recover damages and overcharges. This dispute is neither. And FPL does not explain why the 2-year statute of limitations under Section 415 is "applicable" to a refund of unjust and unreasonable pole

---

[369] 47 C.F.R. § 1.1413(b); Compl. Ex. A at ATT00008 (Rhinehart Aff. ¶ 14); Reply Ex. A at ATT00923 (Rhinehart Reply Aff. ¶ 20).

[370] FPL Br. at 24; Answer ¶ 32.

[371] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.478); 47 C.F.R. § 1.1407(a)(3).

[372] *See Time Warner Entm't*, 14 FCC Rcd at 9154 (¶ 11) ("Therefore, we will order FPL to reimburse the Complainants for any charges over the amount of the maximum permitted annual pole attachment rate of $5.79 per pole, beginning April 13, 1998 through the present, plus interest.").

[373] *See* Fla. Stat. § 95.11(2)(b) (applying to "legal or equitable action[s] on a contract, obligation, or liability founded on a written instrument …").

[374] *See* Answer ¶ 32.

attachment rentals, except to say that Section 415 is included in the Communications Act and has been applied to cases covered by its express terms.[375]

But the Commission did not incorporate Section 415 when it adopted a statute of limitations for disputes involving violations of the Pole Attachment Act, instead deciding that they should be treated consistently "with the way that claims for monetary recovery are generally treated under the law."[376] This followed a long line of precedent that "when there is no statute of limitations expressly applicable to a federal statute, …. 'the general rule is that a state limitations period for an analogous cause of action is borrowed and applied to the federal claim.'"[377] Section 415 is not "expressly applicable" to the Pole Attachment Act or to this case, which does not seek to recover "lawful" charges or to obtain damages from a "carrier."[378] But the federal claim in this case *does* involve a contract, and so "contract law provides the best analogy."[379]

---

[375] Answer ¶ 32 n.65; *see also Am. Cellular Corp., et al. v. BellSouth Telecomms., Inc.*, 22 FCC Rcd 1083, 1088 (¶ 12) (2007) ("[C]laims (like [Complainant]'s) for recovery of damages from carriers are specifically governed by the limitations period set forth in section 415(b)."); *Michael J. Valenti, et al. v. Am. Tel. and Telegraph Co.,* No. FCC 97-26, 1997 WL 818519, at *3 (¶ 11) (OHMSV Feb. 26, 1997) (finding damages claim barred by Section 415(b) where "both defendants were 'common carriers'"); *Municipality of Anchorage d/b/a Anchorage Tel. Util. v. Alascom, Inc.*, 4 FCC Rcd 2472, 2474 (¶ 19) (1989) (finding Section 415(b) applicable because the action was against a "carrier[ ] for the recovery of damages").

[376] *See Pole Attachment Order*, 26 FCC Rcd at 5289-90 (¶¶ 110-12); *see also Pole Attachment Order NPRM*, 25 FCC Rcd at 11902 (¶ 88) ("Generally speaking, a plaintiff is entitled to recompense going back as far as the applicable statute of limitations allows. There does not appear to be a justification for treating pole attachment disputes differently.").

[377] *Hoang v. Bank of Am., N.A.*, 910 F.3d 1096, 1101 (9th Cir. 2018) (quoting *Cnty. of Oneida v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 240 (1985)); *see also Spiegler v. District of Columbia*, 866 F.2d 461, 463-64 (D.C. Cir. 1989) ("When Congress has not established a statute of limitations for a federal cause of action, it is well-settled that federal courts may 'borrow' one from an analogous state cause of action, provided that the state limitations period is not inconsistent with underlying federal policies.").

[378] *See* 47 U.S.C. § 415.

[379] *Hoang*, 910 F.3d at 1101.

The Commission should "adopt the general contract law statute of limitations,"[380] which is 5 years in Florida.[381]

F. FPL's Other Attempts To Avoid Or Delay Rate Reductions Fail.

1. AT&T Repeatedly And In Good Faith Tried To Settle This Dispute.

FPL argues that the Commission should dismiss the complaint for failure to satisfy the pre-complaint negotiation requirement of 47 C.F.R. § 1.722(g)[382]—an argument that FPL effectively waived when it did not file a motion on the issue.[383] The argument is also meritless.[384] The record shows that AT&T repeatedly and exhaustively explained its argument that FPL's rates are unjust and unreasonable, in good faith tried to negotiate with FPL for a just and reasonable rate, traveled to FPL's headquarters for an executive-level meeting, and participated in a private mediation in its effort to reach a settlement.[385] AT&T thus "notified [FPL] in writing of the allegations that form the basis of the complaint," "invited a response within a reasonable period of time," and "in good faith, discussed or attempted to discuss the possibility of settlement with [FPL]."[386] FPL has provided no valid basis for dismissing or

---

[380] *Id.*

[381] Fla. Stat. § 95.11(2)(b).

[382] *See* FPL Br. at 14-20.

[383] *See* Letter from L. Griffin to Counsel (Aug. 21, 2019).

[384] Reply Ex. A at ATT00927-31 (Rhinehart Reply Aff. ¶¶ 30-38); Reply Ex. B at ATT00956-57 (Miller Reply Aff. ¶¶ 2-3); Reply Ex. A at ATT00963-65 (Peters Reply Aff. ¶¶ 3-4, 7).

[385] *See, e.g.*, Compl. Ex. A at ATT00003-4 (Rhinehart Aff. ¶¶ 4-5); Compl. Ex. B at ATT00054-57 (Miller Aff. ¶¶ 12-22); Compl. Exs. 4-29.

[386] 47 C.F.R. § 1.722(g).

staying this complaint for further negotiations—particularly when FPL has taken the position that further negotiations "would be an exercise in [f]utility."[387]

First, FPL argues that AT&T "never provided FPL the basis of its Complaint in writing,"[388] such that FPL had "no advance written notice of any of the … allegations."[389] But this argument rings hollow. FPL was so prepared for AT&T's Complaint that it retained an outside consultant to obtain data for its Answer on June 22, 2019—9 days *before* AT&T filed the Complaint.[390] FPL also admits that AT&T challenged the invoiced rates under federal law in August 2018, almost 11 months before the Complaint was filed,[391] and "that the parties engaged in written communications" and "held face-to-face meetings" about issues raised in AT&T's Complaint.[392]

And throughout the months of negotiations, FPL was fully aware of the basis for AT&T's Complaint; it simply disagreed with AT&T on the merits.[393] Why else would FPL emphasize to

[387] *See* ATT00843; *see also* FPL Br. at 19 ("FPL also emphasized to AT&T several times that FPL was unwilling to negotiate a new rate going forward.").

[388] *Id*. at 3, 15-18.

[389] *Id*. at 17.

[390] *See* Answer Ex. E at FPL00173 (Murphy Decl., Ex. A).

[391] Answer ¶¶ 20, 33, 40-41, 42.

[392] Answer ¶ 7; *see also, e.g.*, Compl. Ex. 5 at ATT00164 (Email from K. Hitchcock, AT&T, to T. Kennedy, FPL (Aug. 21, 2018)) (outlining AT&T's position that the new telecom rate should presumptively apply, that AT&T is not aware of any net material competitive advantage that would warrant a higher rate, and that, even if FPL could show otherwise, FPL could still not lawfully charge invoiced rates because they exceed the "hard cap" set by the pre-existing telecom formula).

[393] *See* Answer ¶ 14 ("At no time during the parties' negotiations did AT&T come close to making a compelling argument that either [FCC] order applied to the parties' relationship.").

AT&T that it was unwilling to negotiate a new rate?[394] In August 2018, FPL told AT&T it "believe[d] that AT&T is misinterpreting the FCC Pole Attachment orders and their application to our Agreement."[395] In January 2019, after the parties' executive-level meeting, FPL thought each company had "previously made our positions clear" about "the application of federal law to our longstanding written agreement."[396] And FPL now admits it "repeatedly explained to AT&T" FPL's meritless belief that because "the 1975 JUA pre-dates both the *2011 Pole Attachment Order* and the *2018 Third Report and Order*, … neither order is applicable to such agreements."[397]

FPL is also incorrect in suggesting that it did not know what rental rates AT&T was seeking.[398] AT&T repeatedly asked FPL for a competitively neutral new telecom rate—and to share with AT&T the specific new telecom rates FPL charges AT&T's competitors.[399] FPL was the only party to the negotiations that knew those rates, but it refused to disclose or discuss them

[394] *See, e.g.*, Compl. Ex. 10 at ATT00188 (Email from M. Jarro, FPL to D. Miller, AT&T (Dec. 4, 2018)); *see also* Compl. Ex. 12 at ATT00197 (Email from M. Jarro, FPL to D. Miller, AT&T (Dec. 20, 2018); FPL Br. at 19.

[395] Compl. Ex. 6 at ATT00173 (Notice of Default (Aug. 31, 2018)).

[396] Compl. Ex. 20 at ATT00222 (Letter from M. Jarro, FPL, to D. Miller, AT&T (Jan. 31, 2019)).

[397] Answer ¶ 14.

[398] *See, e.g.*, FPL Br. at 17.

[399] *See, e.g.*, Compl. Ex. 8 at ATT00179 (Email from D. Rhinehart, AT&T, to M. Jarro, FPL (Oct. 4, 2018)); Ex. 10 at ATT00188 (Email from D. Miller, AT&T, to M. Jarro, FPL (Dec. 3, 2018)); *id.* at ATT00187 (Email from D. Miller, AT&T, to M. Jarro, FPL (Dec. 6, 2018)); Compl. Ex. 12 at ATT00196 (Email from D. Bromley, FPL, to D. Miller, AT&T (Dec. 20, 2018)) (responding to questions from D. Miller, AT&T, to M. Jarro, FPL).

with AT&T[400]—something it could not lawfully do were it negotiating with one of AT&T's competitors.[401]

Second, FPL is wrong that "AT&T never proposed to discuss any of the issues which AT&T now alleges in its Complaint"[402] and that, had AT&T done so, FPL would have "presented AT&T with the same information … that it now presents to the Commission."[403] AT&T asked FPL to discuss "federal law and its requirement for competitively neutral, just and reasonable rates" at the executive-level meeting,[404] including FPL's comparison of the JUA with "the rates, terms and conditions that apply to [AT&T's] competitors to assess whether the invoiced rates are 'just and reasonable.'"[405] AT&T also asked that the parties' dispute over "the 'just and reasonable' rental rates that AT&T is entitled to under the federal Pole Attachment Act" be submitted to non-binding mediation.[406] FPL thus had every opportunity to discuss the issues AT&T raised, and to offer evidence and argument in response. It simply chose not to.[407]

---

[400] *See* Compl. Ex. A at ATT00004 (Rhinehart Aff. ¶ 5); Compl. Ex. B at ATT00058 (Miller Aff. ¶ 22); Reply Ex. A at ATT00929-30 (Rhinehart Reply Aff. ¶¶ 34-36).

[401] *See* 47 C.F.R. § 1.1404(f).

[402] FPL Br. at 18 n.64.

[403] *See* FPL Br. at 20; *see also* Answer ¶ 14.

[404] Compl. Ex. 8 at ATT00179 (Email from D. Rhinehart, AT&T, to M. Jarro, FPL (Oct. 4, 2018)).

[405] Compl. Ex. 10 at ATT00187 (Email from D. Miller, AT&T, to M. Jarro, FPL (Dec. 6, 2018)).

[406] Compl. Ex. 17 at ATT00212 (Email from D. Miller, AT&T, to M. Jarro, FPL (Jan. 24, 2019)).

[407] *See, e.g.*, Compl. Ex. 10 at ATT00188 (Email from M. Jarro, FPL, to D. Miller, AT&T (Dec. 4, 2018); Compl. Ex. 12 at ATT00196 (Email from D. Bromley, FPL, to D. Miller, AT&T (Dec. 20, 2018)); Compl. Ex. 22 at ATT00233 (Email from D. Bromley, FPL, to D. Miller, AT&T (Dec. 20, 2018)); *see also* Compl. Ex. A at ATT00004 (Rhinehart Aff. ¶ 5); Compl. Ex. B at ATT00058 (Miller Aff. ¶ 22).

Third, FPL argues that it was justified in refusing AT&T's efforts to negotiate because AT&T did not invoke a renegotiation provision in the JUA.[408] But AT&T did not have to invoke the provision. AT&T's federal statutory right to just and reasonable rates "may not be defeated by private contractual provisions"[409] and, in any event, the JUA expressly requires FPL to ensure "conformity with all applicable provisions of law."[410] AT&T also had a very good reason *not* to invoke the provision: doing so would have automatically terminated the JUA six months later and thereby prevented AT&T from attaching to new FPL pole lines.[411] But AT&T requested "just and reasonable" rates because "greater rate parity between [I]LECs and their telecommunications competitors 'can energize and further accelerate broadband deployment.'"[412] There was no good reason to trigger an inapplicable provision that would have the opposite effect.[413]

2. AT&T Did Not Engage In Any Unlawful "Self-Help," But Paid FPL's Invoices In Full And At The Time FPL Demanded.

FPL's argument that AT&T engaged in "self-help" by failing to pay the disputed rates while challenging them through the dispute resolution process is false and irrelevant.[414] For

---

[408] *See* FPL Br. at 19-20; Answer ¶¶ 17, 23, 24, 27.

[409] *See Third Report and Order*, 33 FCC Rcd at 7731 (¶ 50) (citation omitted).

[410] Compl. Ex. 1 at ATT00119 (Art. VI). FPL admits the JUA requires compliance with "federal law," Answer ¶ 26, but argues that compliance is limited to the National Electric Safety Code, *id.* n.41. But the JUA requires compliance with both: "Joint use of poles covered by this Agreement shall at all times be in conformity with all applicable provisions of law *and* the terms and provisions of the Code …." *See* Compl. Ex. 1 at ATT00119 (Art. VI) (emphasis added).

[411] Compl. Ex. 1 at ATT00124 (JUA, § 11.2).

[412] *Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126) (citation omitted); *see also, e.g.*, Compl. Ex. B at ATT00054 (Miller Aff. ¶ 12).

[413] *See, e.g.*, Reply Ex. A at ATT00928-29 (Rhinehart Reply Aff. ¶¶ 32-33); Reply Ex. B at ATT00956-57 (Miller Reply Aff. ¶ 3); Reply Ex. C at ATT00963-64 (Peters Reply Aff ¶¶ 4-5).

[414] *See, e.g.*, FPL Br. at 20-22.

while FPL falsely states that "the last time AT&T made a payment to compensate FPL for the use of its pole network was for the 2016 calendar year," FPL ultimately admits that AT&T paid the entire "outstanding principal balance" FPL claimed was "due for the calendar years 2017 and 2018."[415] "Self-help" is a non-issue.

And, indeed, AT&T did *not* engage in "self-help." It instead proceeded exactly as the parties intended when an invoice is disputed: by seeking to settle the amount that is due through a mandatory dispute resolution process.[416] FPL recognized as much, threatening AT&T with operational restrictions throughout the negotiations, but stating that it would "not take any immediate adverse action" provided AT&T paid the disputed invoices "at the close of the mediation process."[417] And so, when it became clear that the rental rate dispute was not going to be resolved at the end of the dispute resolution process, AT&T processed payment of the disputed amounts as FPL requested.[418] AT&T has, therefore, paid "the disputed rates while simultaneously challenging them."[419] But why AT&T sought to resolve the amount due *before* paying the disputed invoices is now clear: because FPL, having received the full payment it demanded, now argues that refunds are "foreclosed."[420]

---

[415] *See id.* at 2.

[416] Compl. Ex. 1 at ATT00136-37 (JUA Art. XIIIA). There was also no "over two year" period involved. *See* FPL Br. at 9. According to FPL, its 2017 invoice was dated March 5, 2018, and was promptly disputed by April 3, 2018. *See id*. The 2018 invoice was dated February 1, 2019 and it was paid in full, along with the 2017 invoice, on July 1, 2019. *See id.* at 12, 13.

[417] Compl. Ex. 23 at ATT00250 (Notice of Termination).

[418] Reply Ex. B at ATT00957-58 (Miller Reply Aff. ¶ 5).

[419] FPL Br. at 21 (citations omitted).

[420] *See* Answer ¶ 32.

And contrary to FPL's argument, AT&T's conduct did not violate the Communications Act.[421] One case that FPL cites is "not good law" because the FCC has since clarified that nonpayment of disputed charges does *not* violate federal law.[422] FPL cites another case that does "not rule on the lawfulness of … self-help."[423] Other decisions FPL cites deal with distinguishable issues, such as those presented when parties seek injunctive relief.[424] And one even recognizes that it could "be unjust to require a party, who is entitled to withhold payment for charges that are the subject of a good faith dispute, to simply pay those charges anyway."[425]

3. FPL's Affirmative Defenses Lack Merit.

FPL concludes its Answer with a series of 13 defenses that lack merit on the facts and the law and that improperly seek to relitigate matters that "already fully have been considered and rejected by the Commission" in prior rulemakings.[426]

---

[421] *See* FPL Br. at 21.

[422] *See id.* at 21 n.74 (citing *MGC Commc'ns, Inc. v. AT&T Corp*., 14 FCC Rcd 11647 (1999), *aff'd*, 15 FCC Rcd 308 (1999)); *but see All Am. Tel. Co. v. AT&T Corp*., 26 FCC Rcd 723, 732 (¶ 20) (2011) ("To the extent the Commission's decision in *MGC* can be read to stand for the proposition that a carrier's failure to pay access charges violates the Act, we hold that it is not good law."); *see also Line Sys., Inc. v. Sprint Nextel Corp*., No. 11-6527, 2012 WL 3024015, at *6 (E.D. Pa. July 24, 2012) (dismissing claim because "failure to pay … tariffed charges … does not give rise to a claim … for breach of the [Communications] Act" (quotation omitted)).

[423] *In the Matter of Communique Telecomms., Inc.,* Declaratory Ruling and Order, 10 FCC Rcd 10399, 10405 (¶ 31) (1995) (cited at FPL Br. at 21 n.74).

[424] *In the Matter of MCI Telecomms. Corp*., Memorandum Opinion and Order, 62 FCC 2d 703 (1976) (cited at FPL Br. at 21 n.74); *see also Nat'l Commc'ns Ass'n, Inc. v. Am. Tel. & Tel. Co*., No. 93 CIV. 3707(LAP), 2001 WL 99856, at *5 (S.D.N.Y. Feb. 5, 2001) (relying on *Communique Telecomms*, 10 FCC Rcd ¶¶ 1, 36; *MCI Telecomms. Corp.*, 62 FCC 2d at 705-06 (¶¶ 6-7)) (cited at FPL Br. at 21 n.74).

[425] *Level 3 Commc'ns, LLC v. Tel. Operating Co. of Vermont, LLC*, No. 5:11-CV-280, 2011 WL 6291959, at *12 (D. Vt. Dec. 15, 2011) (cited at FPL Br. at 21-22).

[426] *In the Matter of Improving Pub. Safety Commcns in the 800 Mhz Band New 800 Mhz Band Plan for Puerto Rico & the U.S. Virgin Islands*, 26 FCC Rcd 1058, 1063 (¶¶ 12-13) (2011). Four of the affirmative defenses have already been addressed. *See* Answer, Affirmative Defenses B

First, FPL argues that AT&T should be estopped from receiving a refund due to "unclean hands" because the 1975 JUA was "in place for several decades" without complaint and was then challenged during "months of discussion" that FPL found unsatisfactory.[427] Whether an estoppel or unclean hands defense is available in a pole attachment complaint proceeding is doubtful.[428] But if it were available, it fails. AT&T is statutorily entitled to "just and reasonable" rates for use of FPL's poles; that AT&T paid and challenged rates charged by FPL that were in violation of federal law "is of no consequence."[429]

Second, FPL argues that the Commission should forbear from enforcing its rules, claiming that "the Commission's justifications for the assertion of jurisdiction over the rates, terms and conditions of ILEC attachments to electric utility poles are not supported by the facts in this case."[430] This case presents *worse* facts: AT&T has been paying rates under the JUA that far exceed the average $26.12 per-pole rate that, in part, led the Commission to adopt the new

---

(good-faith negotiations), C (applicability of the new telecom rate presumption), J (statute of limitations), K (retroactivity and Takings Clause); *see also* Sections II.F(1), II.B(2), II.E(2), II.B(1), and "market" rates analyses above.

[427] Answer, Affirmative Defense A.

[428] *See Marzec v. Power*, 15 FCC Rcd 4475, 4480, n.35 (2000) ("[T]he Commission has expressed doubt that the unclean hands defense is available in [formal complaint] proceedings.").

[429] *AT&T Servs. Inc. v. Great Lakes Comet, Inc.*, 30 FCC Rcd 2586, 2597 (¶ 36) (2015) ("[T]he doctrines of waiver, estoppel, laches, and ratification do not preclude AT&T from challenging [the] rates …. AT&T is entitled to receive Defendants' services at rates no higher than what the Commission has determined to be just and reasonable. That AT&T ordered and paid for Defendants' services for a period of time, therefore, is of no consequence."); *Qwest Commc'ns Co. v. Sancom, Inc.*, 28 FCC Rcd 1982, 1993-94 (¶ 27) (2013) ("We also are unpersuaded by Sancom's argument that Qwest has 'unclean hands,' in that Qwest did not first pay Sancom amounts owing under the Tariff. Even if this defense were available in a section 208 formal complaint proceeding, it would fail in this case. As discussed above, Sancom unlawfully charged Qwest for tariffed switched access services. Accordingly, Qwest cannot have violated any alleged equitable principle by failing to pay the charges before disputing them.").

[430] Answer, Affirmative Defense D.

telecom rate presumption in order to accelerate rate relief to ILECs.[431] FPL also has not filed a proper forbearance request and the Commission cannot forbear from applying its rules only to one ILEC's attachments on one electric utility's poles.[432] Forbearance is also precluded by statute because enforcement of AT&T's right to just and reasonable rates is (1) "necessary to ensure that the … regulations … in connection with … telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory," (2) "necessary for the protection of consumers," and (3) "consistent with the public interest."[433]

Third, FPL argues that the Commission should waive the applicability of its rules under 47 C.F.R. § 1.3.[434] FPL's request is facially invalid as FPL has not demonstrated "good cause" or "plead with particularity the facts and circumstances which warrant such action."[435] Nor could FPL meet the applicable standard because "a party seeking waiver of a rule's requirements must demonstrate that 'special circumstances warrant a deviation from the general rule' and 'such deviation will serve the public interest.'"[436] "In order to demonstrate the required special circumstances, [the party seeking waiver] must show that the application of the … rule would be inequitable, unduly burdensome or contrary to the public interest or that no reasonable

---

[431] *See Third Report and Order*, 33 FCC Rcd at 7768-69 (¶ 125); *see also* Compl. ¶ 13.

[432] 47 C.F.R. §§ 1.53-1.59.

[433] *See* 47 U.S.C. § 160(a); *see also Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126) (finding "just and reasonable" rates for ILECs "will promote broadband deployment and serve the public interest [because] greater rate parity between [ILECs] and their telecommunications competitors can energize and further accelerate broadband deployment").

[434] Answer, Affirmative Defense E.

[435] 47 C.F.R. § 1.3; *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664, 666 (D.C. Cir. 1968).

[436] *See In the Matter of Results Broad. Rhinelander, Inc. Pet. for Waiver of Final Payment Deadline for Winning Bids in Auction 94*, No. DA19-1002, 2019 WL 4942573, at *3 (Oct. 3, 2019) (citing case law interpreting 47 C.F.R. § 1.3).

alternative existed which would have allowed it to comply with the rule."[437] FPL has not and cannot meet that standard. A "just and reasonable" rate for AT&T's use of FPL's pole cannot be "inequitable."[438] Collection of a "fully compensatory" new telecom rate cannot be "unduly burdensome."[439] And application of the Commission's rules to ensure just and reasonable rates *will* "*serve the public interest* [because] greater rate parity between [ILECs] and their telecommunications competitors can energize and further accelerate broadband deployment."[440]

Fourth, FPL inappropriately tries to reopen the Commission's rulemaking by again arguing that the Commission cannot lawfully put the burden of proof on FPL to rebut the new telecom rate presumption.[441] To the contrary, the burden *should* be on the party that seeks to benefit from an exception to a general rule.[442] The Commission, therefore, has regularly and correctly placed the burden on the party that seeks a rate different from the "just and reasonable"

---

[437] *Id.*

[438] *See id.*; *see also FPL Order*, 30 FCC Rcd at 1146 (¶ 18) ("'Just and reasonable' and 'arbitrary and capricious' are mutually exclusive concepts.").

[439] *See Rhinelander*, 2019 WL 4942573, at *3; *see also Pole Attachment Order*, 26 FCC Rcd at 5321 (¶ 183 n.569) (quoting National Broadband Plan at 110).

[440] *See id.*; *Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126); *see also, e.g.*, *Pole Attachment Order*, 26 FCC Rcd at 5241 (¶ 1) ("Th[is] Order is designed to promote competition and increase the availability of robust, affordable telecommunications and advanced services to consumers throughout the nation."). For this same reason, FPL cannot show that no reasonable alternative existed which would have allowed it to comply with the "just and reasonable" rate requirement.

[441] Answer, Affirmative Defense F; *see also* Comments of FPL at 27-30 (June 14, 2017); *In Re Applications of Shaw Commc'ns, Inc.*, 27 FCC Rcd 6995, 6996-97 (2012) (rejecting argument that "merely re-argues points" presented to the Commission before it issued the relevant Order).

[442] *See, e.g.*, *United States v. Taylor*, 686 F.3d 182, 190 n.5 (3d Cir. 2012) ("[N]umerous Supreme Court decisions … dating back at least to 1841, held that the party who wishes to rely on an exception … must raise it and establish it.") (citing cases); *see also FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948) ("[T]he general rule of statutory construction [is] that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits.").

rate that is calculated using the Commission's presumptive inputs.[443] This presumption is no different.[444] Indeed, the only two cases FPL cites to support this defense explain that "the ordinary default rule that plaintiffs bear the risk of failing to prove their claims … admits of exceptions,"[445] including by administrative regulation.[446]

Fifth, FPL asks the Commission to change its longstanding sign-and-sue rule, arguing that it is arbitrary and capricious because AT&T should have been required to take exception to the rates in the JUA when it was negotiated.[447] But "the rule is a reasonable exercise of the agency's duty under the statute to guarantee fair competition in the [pole] attachment market,"[448] and this is not the time or the appropriate vehicle to reconsider the sign and sue rule.[449] The Commission is required to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and … to hear and resolve

---

[443] *See, e.g.*, *Ala. Cable Telecomms. Ass'n*, 16 FCC Rcd at 12236 (¶ 59) ("[I]n any individual complaint proceeding, the pole height presumption may be overcome with credible evidence that the utility's poles have a different average height."); *Amendment of Rules & Policies Governing the Attachment of Cable Television Hardware to Util. Poles*, 2 FCC Rcd 4387, 4390 (¶ 19) (1987) ("These [appurtenance factor] ratios shall be rebuttable presumptions to be utilized in the event no party chooses to present probative, direct evidence on the actual investment in non-pole-related appurtenances.").

[444] *See, e.g.*, *S. Co. Servs., Inc. v. FCC*, 313 F.3d 574, 584-85 (D.C. Cir. 2002) ("The possibility that a utility can present information [rebutting the presumption] makes it clear that the rule is not facially unreasonable.").

[445] *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57 (2005) (cited at Answer p. 31 n.82).

[446] *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 295 (1994) (cited at Answer p. 31 n.82).

[447] Answer, Affirmative Defense G.

[448] *S. Co. Servs.*, 313 F.3d at 583-84.

[449] *See, e.g.*, *In the Matter of Am. Tel. & Tel. Co*., 8 FCC Rcd 1767, 1771-74 (1993) (rejecting "arguments that were previously considered and rejected by the Commission" in a prior Order).

complaints concerning such rates, terms, and conditions."[450] The FCC, therefore, must ensure "just and reasonable" rates even if "the attacher has agreed, for one reason or another, to pay a rate above the statutory maximum or otherwise relinquish a valuable right to which it is entitled under the Pole Attachments Act and the Commission's rules."[451] Any other standard "would subvert the supremacy of federal law over contracts."[452]

Sixth, FPL argues that the Commission's assertion of jurisdiction over the rates charged ILECs is "unlawful, ultra vires, arbitrary, capricious and unreasonable" because the statutory term "providers of telecommunications service" should be read as "synonymous with 'telecommunications carrier,'" a term that excludes ILECs.[453] The Commission correctly rejected this argument in its 2011 *Pole Attachment Order* when it found that ILECs, including AT&T, are "providers of telecommunications service" that are statutorily entitled to just and reasonable pole attachment rates.[454] The D.C. Circuit affirmed.[455]

Seventh, FPL argues that the Commission's new telecom rate presumption reflects arbitrary and capricious rulemaking because it reflects "continually shifting positions with respect to the regulatory treatment of ILECs."[456] But the Commission's 2018 *Order* reasonably

---

[450] 47 U.S.C. § 224(b).

[451] *S. Co. Servs*., 313 F.3d at 583 (citation omitted).

[452] *Third Report and Order*, 33 FCC Rcd at 7731 (¶ 50) (internal quotation and alteration omitted); *see also Pole Attachment Order NPRM*, 25 FCC Rcd at 11908 (¶ 105) ("The Commission would not be fulfilling [its statutory] duty if it were to substitute the requirements of contract law for the dictates of section 224.").

[453] Answer, Affirmative Defense H.

[454] *See Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 211).

[455] *See Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183, 188 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 18 (2013).

[456] Answer, Affirmative Defense I.

and incrementally built upon the approach adopted in the 2011 *Order* in an effort to accelerate the rate reductions that should have taken effect then.[457] The same principle of competitive neutrality applies, but the Commission clarified that an electric utility cannot charge ILECs rates higher than the competitively neutral new telecom rate unless it can back up its allegations with more than its own, self-serving say-so.[458] It also sought to narrow disputes by clarifying maximum "just and reasonable" rates that may be charged where an electric utility can do so.[459] These refinements to the approach adopted in 2011 were lawful, reasonable, correct, within the Commission's authority, and are effective pending appeal.[460]

Eighth, FPL argues that the Commission should apply laches to postpone rate relief until the date it issues an Order in this case.[461] Were laches an available defense in a pole attachment complaint proceeding,[462] it would fail here. Equity does *not* support non-compliance with federal law.[463] And, in any event, rate relief has never been appropriate only as of the date of the

---

[457] *See, e.g.*, *Third Report and Order*, 33 FCC Rcd at 7706 (¶ 1) ("Today, we continue our efforts to promote broadband deployment by speeding the process and reducing the costs of attaching….").

[458] *Id.* at 7770-71 (¶ 128).

[459] *Id.* at 7771 (¶ 129) ("This conclusion builds on and clarifies the Commission's determination in the *2011 Pole Attachment Order* that the pre-2011 telecommunications carrier rate should serve "as a reference point in complaint proceedings" where a joint use agreement was found to give net advantages to an [I]LEC as compared to other attachers.").

[460] *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Final Rule, 84 Fed. Reg. 2460-01 (Feb. 7, 2019).

[461] Answer, Affirmative Defense L.

[462] *But see Air Touch Cellular v. Pac. Bell*, 16 FCC Rcd 13502, 13508 (¶ 17) (2001) (questioning whether equitable defenses, including laches, are available in formal complaint proceedings); *see also AT&T Servs. Inc.*, 30 FCC Rcd at 2597 (¶ 36 & n.123) (same).

[463] *See, e.g.*, *AT&T Servs. Inc.*, 30 FCC Rcd at 2597 (¶ 36); *Qwest Commc'ns Co.*, 28 FCC Rcd at 1993-94 (¶ 27); *Air Touch Cellular*, 16 FCC Rcd at 13508 (¶ 17).

Commission's Order in a pole attachment complaint proceeding. The Commission's pre-2011 rule provided rate relief as of the date a Pole Attachment Complaint was filed. The Commission decided that filing-date approach "fails to make injured attachers whole," rejected an interim approach that would "preclude monetary recovery for any period prior to the time a utility receives actual notice of a disputed charge," and adopted the current approach that authorizes rate relief as far back as the statute of limitations allows.[464] The D.C. Circuit affirmed, finding it "hard to see any legal objection to the Commission's selection" of this "reasonable period for accrual of compensation for overcharges or other violations of the statute or rules."[465] FPL cannot escape liability for violations of federal law during the applicable statute of limitations.

Finally, FPL argues that the case should be dismissed as moot based on the incredible assertion that "there is no ongoing contractual relationship between the parties" because FPL terminated the JUA.[466] But notwithstanding such termination, the JUA "shall remain in full force and effect with respect to all poles jointly used by the parties at the time of such termination."[467] In other words, the JUA was "terminated and the parties continue to operate under an 'evergreen' clause" following the effective date of the *Third Report and Order*.[468] The new telecom rate presumption applies,[469] and it should be promptly enforced to ensure the "just and reasonable" rates required by law.

---

[464] *Pole Attachment Order*, 26 FCC Rcd at 5289-90 (¶¶ 110-12); 47 C.F.R. § 1.1407(a)(3).

[465] *Am. Elec. Power Serv. Corp.*, 708 F.3d at 190.

[466] Answer, Affirmative Defense M.

[467] Compl. Ex. 1 at ATT00128 (JUA, Art. XVI).

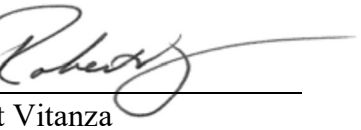
[468] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475).

[469] *Id.*

III. CONCLUSION

For the foregoing reasons, and those detailed in AT&T's Pole Attachment Complaint and Reply and the Affidavits and Exhibits in support of AT&T's Pole Attachment Complaint and Reply, AT&T respectfully requests that the Commission find that FPL charged and continues to charge AT&T unjust and unreasonable pole attachment rates in violation of federal law. AT&T further respectfully requests that the Commission set the just and reasonable rate, effective as of the 2014 rental year, as the rate that is properly calculated in accordance with the new telecom rate formula,[470] and order FPL to refund all amounts paid in excess of a just and reasonable rate with interest,[471] beginning with the 2014 rental year.

Respectfully submitted,

By: 

Robert Vitanza
Gary Phillips
David Lawson
AT&T SERVICES, INC.
1120 20th Street, NW, Suite 1000
Washington, DC 20036
(214) 757-3357

[470] *See* Compl. Ex. A at ATT00008, ATT00016-25 (Rhinehart Aff. ¶ 14 & Ex. R-1); Reply Ex. A at ATT00923, ATT00937-48 (Rhinehart Reply Aff. ¶ 20 & Ex. R-5). Alternatively, in the unlikely event that the Commission concludes that FPL has met its burden to prove by clear and convincing evidence that the JUA provides AT&T a net material advantage over its competitors, AT&T respectfully requests that the Commission set the just and reasonable rate, effective as of the 2014 rental year, at a rate that is no higher than the rate that is properly calculated in accordance with the pre-existing telecom rate formula. *See* Compl. Ex. A at ATT00012, ATT00016-25 (Rhinehart Aff. ¶ 23 & Ex. R-1); Reply Ex. A at ATT00923, ATT00937-48 (Rhinehart Reply Aff. ¶ 20 & Ex. R-5).

[471] *See* Compl. Ex. A at ATT00046-47 (Rhinehart Aff., Ex. R-4). Interest should be awarded at "the current interest rate for Federal tax refunds and additional tax payments." *Cavalier Tel.*, 15 FCC Rcd at 17964 (¶ 4 n.16).

Christopher S. Huther (chuther@wileyrein.com)
Claire J. Evans (cevans@wileyrein.com)
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
(202) 719-7000

Dated: November 6, 2019

Attorneys for BellSouth Telecommunications, LLC d/b/a AT&T Florida

INFORMATION DESIGNATION

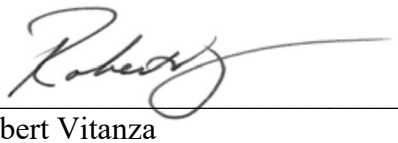
1. The AT&T employees and former employees with relevant information about this rental rate dispute are identified in AT&T's Pole Attachment Complaint, Pole Attachment Complaint Reply, and their supporting Affidavits and Exhibits.

2. Attached to this Pole Attachment Complaint Reply are Affidavits from AT&T employees involved in the rate negotiations and an Affidavit from outside expert Christian M. Dippon, Ph.D.

3. AT&T reserves the right to rely on information that is not appended to this Pole Attachment Complaint Reply as additional information becomes available.

RULE 1.721(M) VERIFICATION

I, Robert Vitanza, as signatory to this submission, hereby verify that I have read this Pole Attachment Complaint Reply and, to the best of my knowledge, information, and belief formed after reasonably inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding.



Robert Vitanza

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2019, I caused a copy of the foregoing Pole Attachment Complaint Reply, Affidavits, and Exhibits in support thereof, to be served on the following (service method indicated):

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Room TW-A325
Washington, DC 20554
(confidential version of Reply, Affidavits, and Exhibits by hand delivery; public version of Reply, Affidavits, and Exhibits by ECFS)

Charles A. Zdebski
Robert J. Gastner
William C. Simmerson
Eckert Seamans Cherin & Mellott, LLC
1717 Pennsylvania Avenue, NW, 12th Floor
Washington, DC 20006
(confidential and public versions of Reply, Affidavits, and Exhibits by email)

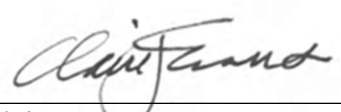
Lisa B. Griffin
Lia Royle
Federal Communications Commission
Enforcement Bureau
Market Disputes Resolution Division
445 12th Street, SW
Washington, DC 20554
(confidential version of Reply, Affidavits, and Exhibits by email; public version of Reply, Affidavits, and Exhibits by ECFS)

Alvin B. Davis
Squire Sanders (US) LLP
200 South Biscayne Boulevard, Suite 300
Miami, FL 33131
(confidential and public versions of Reply, Affidavits, and Exhibits by email)

Kimberly D. Bose, Secretary
Nathaniel J. Davis, Sr., Deputy Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426
(public version of Reply, Affidavits, and Exhibits by overnight delivery)

Joseph Ianno, Jr.
Maria Jose Moncada
Charles Bennett
Florida Power and Light Company
700 Universe Boulevard
Juno Beach, FL 33408
(confidential and public versions of Reply, Affidavits, and Exhibits by overnight delivery)

Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399
(public version of Reply, Affidavits, and Exhibits by overnight delivery)



Claire J. Evans

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA, Complainant, v. FLORIDA POWER AND LIGHT COMPANY, Defendant.	Proceeding No. 19-187 Bureau ID No. EB-19-MD-006

Reply Affidavits

A. Reply Affidavit of Daniel P. Rhinehart (November 5, 2019).

B. Reply Affidavit of Dianne W. Miller (November 5, 2019).

C. Reply Affidavit of Mark Peters (November 6, 2019).

D. Reply Affidavit of Christian M. Dippon, Ph.D. (November 6, 2019).

Reply Exhibits

1. Representative License Agreement 1.

2. Representative License Agreement 2.

3. Representative License Agreement 3.

4. Representative License Agreement 4.

5. FPL Rate Calculation Worksheets (produced by FPL in response to AT&T's interrogatories).

6. FPL Press Release, *FPL installs new poles to strengthen electric grid and help communities prepare for hurricane season*, newsroom.fpl.com/featured-stories?item=30879&printable.

Exhibit A

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA, Complainant, v. FLORIDA POWER AND LIGHT COMPANY, Defendant.	Proceeding No. 19-187 Bureau ID No. EB-19-MD-006

REPLY AFFIDAVIT OF DANIEL P. RHINEHART
IN SUPPORT OF POLE ATTACHMENT COMPLAINT

STATE OF IOWA)
) ss.
COUNTY OF POWESHIEK)

I, Daniel P. Rhinehart, being sworn, depose and say:

1. I am employed by AT&T Services, Inc., a services affiliate of Complainant BellSouth Telecommunications, LLC d/b/a AT&T Florida ("AT&T"). As Director – Regulatory, I support AT&T and AT&T-affiliated entities with respect to the development of pole attachment rates pursuant to Federal Communications Commission ("FCC") and state formulas. I executed a prior Affidavit dated June 27, 2019 in support of AT&T's Pole Attachment Complaint against Florida Power and Light Company ("FPL").[1] I am executing this Reply Affidavit to correct and respond to certain statements made by FPL's witnesses in declarations and affidavits submitted with its September 16, 2019 Answer. I know the following

[1] Compl. Ex. A at ATT00001-47 (Aff. of D. Rhinehart, June 27, 2019).

of my own personal knowledge and, if called as a witness in this action, I could and would testify competently to these facts under oath. I reserve the right to supplement or revise this Reply Affidavit as additional information becomes available.

A. The Declarations Filed By FPL's Witnesses Confirm The Validity Of My Rate And Overpayment Calculations.

2. Throughout the year that AT&T tried to negotiate with FPL, I (or others on my behalf) asked FPL to disclose its new telecom rental rates and the data it used to calculate them.[2] The Commission's 2011 *Pole Attachment Order* made the new telecom rate relevant to the determination of just and reasonable rates for incumbent local exchange carriers ("ILECs") and the Commission's 2018 *Third Report and Order* set the new telecom rate as the presumptive just and reasonable rate for an ILEC with a "new or newly-renewed pole attachment agreement."[3] As a result, a discussion of the new telecom rate and its calculation was necessary—indeed, essential—to negotiate the just and reasonable rate for AT&T's use of FPL's poles.

3. In addition, by asking for the new telecom rate calculations, we would also understand the range of rates referenced in the Commission's 2011 and 2018 *Orders* because the pre-existing telecom rate, meaning the telecom rate formula in effect prior to the 2011 *Pole Attachment Order*, can be easily derived from the new telecom rate. In particular, a properly calculated new telecom rate for use of FPL's poles using the Commission's presumptive inputs is

[2] *See, e.g.*, Compl. Ex. 8 at ATT00179; Compl. Ex. 10 at ATT00187-188; Compl. Ex. 12 at ATT00196-197.

[3] *In the Matter of Accelerating Wireline Broadband Deployment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, 7770 (¶ 127 n.475) (2018) ("*Third Report and Order*").

0.66 times the pre-existing telecom rate. This means that the pre-existing telecom rate is about 1.51 times the properly calculated new telecom rate (1 / 0.66 = 1.51).[4]

4. FPL refused to provide its new telecom rates or its new telecom rate calculations.[5] It was, therefore, impossible to know with certainty what rates FPL has charged AT&T's competitors or whether they were properly calculated when I filed my prior Affidavit. I have now reviewed the rate analysis provided by FPL Director, Clause Recovery & Wholesale Rates, Renae B. Deaton,[6] the new telecom rate development worksheets that FPL produced in response to AT&T's interrogatories,[7] and the overpayment analysis provided by FPL Principal Regulatory Analyst Thomas J. Kennedy.[8] I conclude that my prior calculations were correct and that FPL has inflated its calculations by using improper inputs that do not comply with the FCC's methodology.

5. Thus, the properly calculated per-pole rental rates that result from the FCC's new telecom and pre-existing telecom rate formulas for AT&T's use of FPL's poles during the 2014 through 2018 rental years are the rates that I previously calculated and attached as Exhibit R-1 to my prior Affidavit, and the properly calculated amounts that AT&T overpaid for the 2014 through 2018 rental years are attached as Exhibit R-4 to my prior Affidavit.

---

[4] The 1.51 ratio is an approximation of the actual calculation result, which yields 1.515151… In practice, the pre-existing telecom rate can simply be derived by dividing the new telecom rate by 0.66.

[5] *See, e.g.*, Compl. Ex. 10 at ATT00188; Compl. Ex. 12 at ATT00196-197.

[6] Answer Ex. D at FPL00151-164 (Deaton Decl.).

[7] *See* Reply Ex. 5 (FPL's new telecom rate worksheets).

[8] Answer Ex. A at FPL00020-21, FPL000118-119 (Kennedy Decl. ¶ 38 & Ex. K).

6. In addition, because Ms. Deaton included rate calculations for the 2019 rental year, I calculated the per-pole rental rates that result from the new telecom and pre-existing telecom rate formulas for AT&T's use of FPL's poles during the 2019 rental year. I completed these calculations in the same manner described in my opening Affidavit.[9] A complete set of my rate calculations for the 2014 through 2019 rental years is attached as Exhibit R-5 (rate development) and Exhibit R-6 (weighted average cost of capital).[10] They show that the properly calculated new telecom rate for AT&T's use of FPL's poles during the 2019 rental year is $16.02 per pole and the properly calculated pre-existing telecom rate for AT&T's use of FPL's poles during the 2019 rental year is $24.27 per pole.

1. Ms. Deaton Incorrectly Calculates the New and Pre-Existing Telecom Rates for AT&T's Use of FPL's Poles.

7. Ms. Deaton proposes to charge AT&T new telecom rates that are up to [redacted] times the new telecom rates permitted by Commission rules and up to [redacted] per pole higher than the new telecom rates FPL charged AT&T's competitors based on the same year's cost data:

[9] Compl. Ex. A at ATT00005-07, ATT00011-12 (Rhinehart Aff. ¶¶ 6-13, 22-23).

[10] The sole change to my 2014 through 2018 rental rate calculations from the calculations attached to my prior Affidavit is the correction of a typographical error in the heading line on page 2 of the 2014 through 2017 rate calculations which states "2017 Value" instead of correctly referencing the FERC Form 1 for the immediately preceding year. *See* Compl. Ex. A at ATT00017, ATT00019, ATT00021, ATT00023 (Rhinehart Aff., Ex. R-1). Ms. Deaton did not note this typographical error and it could not have impacted her review or analysis of my calculations given her reliance on the same FERC Form 1 data. *See* Answer Ex. D at FPL00162-162 (Deaton Decl., Ex. RBD-1).

Comparison of Per-Pole New Telecom Rate Calculations						
Rental Year[11]	2014	2015	2016	2017	2018	2019
Cost Year	2013	2014	2015	2016	2017	2018
Properly calculated new telecom rate[12]	$10.46	$11.12	$12.12	$13.32	$15.80	$16.02
New telecom rate FPL charged[13]	$10.44	$11.54	$12.94	$14.84	$16.85	$16.96
Ms. Deaton's rate calculations[14]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

8. Ms. Deaton also proposes to charge AT&T pre-existing telecom rates far higher than permitted by Commission rules. Because the pre-existing telecom rate is 1.51 times a new telecom rate, I converted the new telecom rates FPL charged AT&T's competitors into pre-existing telecom rates.[15] My analysis shows that Ms. Deaton proposes to charge AT&T pre-

[11] It is not clear what time period FPL considers a "rental year" with respect to cable and CLEC attachers because its rate worksheets [redacted], but its response to AT&T's interrogatories reveals that FPL may treat a rental year as including parts of two sequential calendar years. *See* FPL's Resp. to AT&T's Interrog. No. 5; Reply Ex. 5 at ATT (FPL's new telecom rate worksheets). [redacted] *See* Reply Ex. 5 (FPL's new telecom rate worksheets).

[12] Compl. Ex. A at ATT00008, ATT00015-25 (Rhinehart Aff. ¶ 14 & Ex. R-1); Reply Ex. A at ATT00936-950 (Rhinehart Reply Aff., Ex. R-5 and Ex. R-6).

[13] FPL's Resp. to AT&T's Interrog. No. 5; Reply Ex. 5 (FPL's new telecom rate worksheets). [redacted] The rates in the above table are rounded to the nearest penny, which is consistent with FPL's response to AT&T's interrogatories. It is unclear whether FPL rounds its actual billing to the nearest penny. [redacted] The impact of this departure from the FCC's methodology appears to inflate the resulting rental rate.

[14] Answer Ex. D at FPL00155, FPL00162-163 (Deaton Decl. ¶ 8, Ex. RBD-1).

[15] The properly calculated new telecom rate for FPL's poles using the proper presumptive inputs is 0.66 times the properly calculated pre-existing telecom rate, 47 C.F.R. § 1.1406(d), meaning that the pre-existing telecom rate is 1.51 times the new telecom rate (1 / 0.66 = 1.51). In other

existing telecom rates that are up to [redacted] times the pre-existing telecom rates permitted by Commission rules and up to [redacted] per pole higher than the pre-existing telecom rates converted from the rates FPL charged AT&T's competitors based on the same year's cost data:

Comparison of Per-Pole Pre-Existing Telecom Rate Calculations						
Rental Year[16]	2014	2015	2016	2017	2018	2019
Cost Year	2013	2014	2015	2016	2017	2018
Properly calculated pre-existing telecom rate[17]	$15.84	$16.85	$18.37	$20.18	$23.94	$24.27
Pre-existing telecom rate converted from new telecom rates FPL charged[18]	$15.82	$17.48	$19.61	$22.48	$25.53	$25.70
Ms. Deaton's rate calculations[19]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

9. Ms. Deaton's rates violate the Commission's principle of competitive neutrality as they would charge AT&T far more than its competitors. They also were not calculated in accordance with Commission rules. Her errors result in grossly and artificially inflated rental rates, which would overcompensate FPL by capturing far more than the 7.4% of pole costs covered by a properly calculated and fully compensatory new telecom rate and the 11.2% of pole costs covered by a properly calculated pre-existing telecom rate in FPL's urban service area.[20]

---

words, the pre-existing telecom rate may be determined by dividing the new telecom rate by 0.66, which is what I have done here.

[16] [redacted] *See* Reply Ex. 5 (FPL's new telecom rate worksheets).

[17] Compl. Ex. A at ATT00012, ATT00015-25 (Rhinehart Aff. ¶ 23 & Ex. R-1); Reply Ex. A at ATT00936-948 (Rhinehart Reply Aff., Ex. R-5).

[18] This row converts the new telecom rates from FPL's Resp. to AT&T's Interrog. No. 5 [redacted] into pre-existing telecom rates.

[19] Answer Ex. D at FPL00156, FPL00162-163 (Deaton Decl. ¶ 9, Ex. RBD-1).

[20] *See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future,* Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5299, 5305 (¶¶ 137, 150 n.453) (2011) ("*Pole Attachment Order*").

10. Ms. Deaton identifies the three "main drivers" of the differences between the rates that she and I calculated for AT&T's use of FPL's poles.[21] In each instance, the input I use is correct and the input Ms. Deaton proposes is incorrect under FCC methodology.

11. *First*, Ms. Deaton criticizes my use of FPL's publicly reported information when calculating accumulated depreciation for FERC accounts 364, 365, and 369.[22] Ms. Deaton claims that I should have used a lower accumulated depreciation value to calculate a higher pole cost and a higher new telecom rate. She states that FPL "provides" the lower value to the Florida Public Service Commission ("PSC") in annual status reports,[23] but it is not clear whether the reports are officially filed with the Florida PSC. Regardless, the annual status reports are not publicly available and were not provided to AT&T. As a result, I do not have access to the reports and am unable to verify the lower value Ms. Deaton claims I should have used. Without access to publicly filed data or actual data substantiated by FPL,[24] my calculation of accumulated depreciation from the values FPL reported in its FERC Form 1 was correct.

12. *Second*, Ms. Deaton criticizes my use of FPL's weighted average cost of capital when calculating rates for use of FPL's poles.[25] She instead used the higher rate of return set by the FCC for calculating rates for use of an ILEC's poles.[26] Ms. Deaton claims that the swap is

---

[21] Answer Ex. D at FPL00156 (Deaton Decl. ¶ 10).

[22] *Id*.

[23] *Id.*

[24] *See* 47 C.F.R. § 1.1404(e) ("Data should be derived from ARMIS, FERC 1, or other reports filed with state or federal regulatory agencies (identify source).").

[25] Answer Ex. D at FPL00156 (Deaton Decl. ¶ 10).

[26] *Id.* at FPL00155-56 (Deaton Decl. ¶¶ 8, 10); *see also In the Matter of Connect Am. Fund*, 31 FCC Rcd 3087, 3170 (¶ 226) (2016) ("represcrib[ing] the currently authorized rate of return … in all situations where a Commission-prescribed rate of return is used for incumbent LECs").

appropriate because "FPL has been operating under a settlement agreement which is silent on the approved cost of capital."[27] But the proper input when calculating cost-based rates for use of FPL's poles is FPL's "weighted average cost of capital, both debt and equity" even if that value is "no longer announce[d]" by the PSC.[28] And, indeed, FPL uses its own cost of capital when it calculates new telecom rates for AT&T's competitors.[29]

13. Ms. Deaton also suggests that it is okay to substitute the ILEC rate of return for FPL's rate of return because I used the FCC's default ILEC rate of return when calculating proportional rates for FPL's use of AT&T's poles.[30] But the ILEC rate of return is designed for use when calculating rates for use of poles when the ILEC no longer has a state commission regulated rate of return as is the case with AT&T Florida. There is a clear distinction between AT&T and FPL in this matter as AT&T is no longer rate of return regulated and FPL is.

14. *Third*, Ms. Deaton criticizes my use of "rebuttable default values" when calculating the space factor.[31] She instead uses inputs provided to her by FPL Principal Regulatory Analyst Thomas J. Kennedy.[32] There are at least four reasons why Ms. Deaton erred in using Mr. Kennedy's inputs.

15. First, Ms. Deaton's approach improperly treats AT&T differently from AT&T's competitors. FPL's rate development spreadsheets show that FPL [redacted]

[27] Answer Ex. D at FPL00156 (Deaton Decl. ¶ 10).

[28] *See Multimedia Cablevision, Inc. v. Sw. Bell Tel. Co*., 11 FCC Rcd 11202, 11215 (¶ 36) (1996).

[29] *See* FPL's Resp. to AT&T's Interrog. No. 9.

[30] Answer Ex. D at FPL00156 (Deaton Decl. ¶ 10).

[31] *Id.* at FPL00153, FPL00156 (Deaton Decl. ¶¶ 8, 10).

[32] *Id.* at FPL00153 (Deaton Decl. ¶ 8) ("I calculated a Space Factor for FPL's distribution poles based on the following inputs provided by FPL witness Thomas J. Kennedy.").

[redacted] when calculating rates for AT&T's competitors for the 2014 through 2019 rental years.[33] That FPL does not consider the data supplied by Mr. Kennedy sufficiently reliable or credible to use in calculating rates for AT&T's competitors is telling as, for instance, the increased average pole height and usable space would have the effect of reducing the rates FPL charges. The principle of competitive neutrality dictates that such data should not be used to calculate rates for AT&T if they are not used for AT&T's competitors. In addition, Ms. Deaton also uses the presumptive inputs to calculate rates for FPL's use of AT&T's poles in this matter,[34] further confirming that Ms. Deaton agrees that use of the Commission's presumptive inputs is proper.

16. Second, Ms. Deaton inappropriately departs from the presumptive input for space occupied by a communications attacher (1 foot) because Mr. Kennedy instructed her to assign 3.33 feet of safety space to AT&T.[35] The use of the presumptive value, however, is required for all communications attachers, including AT&T, because the Commission already found that the 3.33 feet of safety space is "usable and used by the electric utility."[36] FPL concedes that it cannot lawfully charge AT&T's competitors for use of that safety space, and for the same reason, it cannot lawfully charge AT&T for the space.[37]

---

[33] *See* Reply Ex. 5 (FPL's new telecom rate worksheets).

[34] Answer Ex. D at FPL00157 (Deaton Decl. ¶ 11).

[35] *Id.* at FPL00153 (Deaton Decl. ¶ 8); *see also* Answer Ex. A at FPL00016 (Kennedy Decl. ¶ 30 n.26).

[36] *In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12130 (¶ 51) (2001) ("*Consolidated Partial Order*") ("the 40-inch safety space … is usable and used by the electric utility"); *see also* Reply Ex. C at ATT00974 (Peters Reply Aff. ¶ 23).

[37] *See* FPL's Br. in Support of Its Answer at 70 n.278 ("FPL Br.") (acknowledging "[t]he Commission's prior order regarding safety space being allocated to the electric utility").

17. Third, Ms. Deaton's use of Mr. Kennedy's inputs for space occupied and average number of attaching entities to calculate rates for the 2014 through 2018 rental years is inappropriate because FPL does not have contemporaneous data regarding those inputs. FPL's Quality Deployment Leader, Ronald J. Davis, states that "FPL did not have any data to contradict the presumption that AT&T occupies 1 foot of space" or complete data about the total "number of attachers to each FPL distribution pole" before AT&T filed its Pole Attachment Complaint in July 2019.[38] FPL has thus admitted that it cannot rebut the Commission's presumptive inputs for space occupied and average number of attaching entities for any time period prior to July 2019.

18. Fourth, Ms. Deaton's use of Mr. Kennedy's inputs is inappropriate when calculating rates for any rental year because FPL did not produce valid and reliable data regarding the joint use poles. Mr. Davis explains that in June 2019 he tried to develop a way to assess the accuracy of the Commission's presumptive inputs,[39] which is qualitatively different from designing and conducting a reliable survey to *establish* actual values in the field. Mr. Davis's approach involved a field review of just 2,000 of the 401,919 FPL joint use survey poles to which AT&T is claimed to be attached.[40] The sample reflected only 0.498% of FPL's joint use poles. FPL asked its contractor to collect incomplete information about the poles, specifically the number of governmental attachments and the space occupied by AT&T on those poles.[41] As a result, FPL's contractor did not collect information about the total number of attaching entities

[38] Answer Ex. F at FPL00262 (Davis Decl. ¶ 4).

[39] *Id.* at FPL00263 (Davis Decl. ¶ 5).

[40] Answer Ex. E at FPL00167 (Murphy Decl. ¶ 6). Ultimately the survey found only 1,952 qualifying poles out of the 2,000 selected for review. *Id.* at FPL00168 (Murphy Decl. ¶ 12).

[41] *Id.* at FPL00173 (Murphy Decl., Ex. A).

on those poles, unusable space, or usable space. FPL also did not coordinate with AT&T in conducting the field review to enhance the accuracy of the data collected, unlike the pole audits FPL has conducted to compile pole count data for use in billing third parties.[42]

19. FPL's quick review of poles this past summer did not collect complete data about any particular pole, so Mr. Kennedy tried to fill in the gaps with data from pole audits conducted over a five-year period.[43] The undocumented parameters asserted by Mr. Kennedy were limited to "FPL Distribution Poles with AT&T attached."[44] And notably, FPL did not submit copies of its annual survey data related to poles on which AT&T is attached in support of Mr. Kennedy's claimed alternative formula presumptions. In any event, Mr. Kennedy's additive approach does not provide a reliable or current picture of today's joint use network. In addition, while it may be impractical to collect full survey data for all of FPL's poles in a single year, the age of the oldest parts of the survey data will undoubtedly give rise to some inaccuracies. Indeed, FPL's contractor, Robert Murphy, explained old data is not 100% accurate because "field conditions can change over that time period."[45] Because there is no complete, reliable, and current data about the joint use poles, I was correct to use the Commission's presumptive inputs to calculate the space factor.

20. Because Ms. Deaton's criticisms are misplaced, I continue to conclude that the properly calculated new telecom rates for AT&T's use of FPL's poles during the 2014 through 2019 rental years are $10.46, $11.12, $12.12, $13.32, $15.80, and $16.02 per pole,

---

[42] *See* Answer Ex. A at FPL00015 (Kennedy Decl. ¶ 28).

[43] *Id.* at FPL00015-17 (Kennedy Decl. ¶¶ 28, 30); Answer Ex. E at FPL00167 (Murphy Decl. ¶ 6).

[44] Answer Ex. A at FPL00015-17 (Kennedy Decl. ¶ 28).

[45] Answer Ex. E at FPL00168 (Murphy Decl. ¶ 12).

respectively.[46] I also conclude that the properly calculated pre-existing telecom rates for AT&T's use of FPL's poles during the 2014 through 2019 rental years are $15.84, $16.85, $18.37, $20.18, $23.94, and $24.27 per pole, respectively.[47]

21. These rates are per-pole rates, and it appears that Ms. Deaton agrees that the new and pre-existing telecom rate formulas produce per-pole rates.[48] FPL, however, argues that if "the Commission applies the new telecom rate to AT&T's attachments to FPL's poles, it should be applied on a per foot basis."[49] This is incorrect. The Commission has held that multiple-foot occupancy by an attacher cannot be assessed as a simple multiple of a one-foot new telecom rate.[50] Rather, the new telecom formula includes a "space occupied" input that can be adjusted if reliable, actual data show that a communications attacher occupies, on average, more than the presumptive one foot of space on a utility's poles.[51] Adherence to the formula is crucial because proper application of the formula ensures that the unusable space on the pole is equally divided among the attaching entities as legally required.[52] FPL's multiplication approach would instead

[46] Compl. Ex. A at ATT00008, ATT00015-25 (Rhinehart Aff. ¶ 14 & Ex. R-1); Reply Ex. A at ATT00936-948 (Rhinehart Reply Aff., Ex. R-5).

[47] Compl. Ex. A at ATT00012, ATT00015-25 (Rhinehart Aff. ¶ 23 & Ex. R-1); Reply Ex. A at ATT00936-948 (Rhinehart Reply Aff., Ex. R-5).

[48] *See* Answer Ex. D at FPL00161-164 (Deaton Decl., Ex. RBD-1).

[49] Answer ¶ 37; *see also id.* ¶ 8.

[50] *See, e.g.*, *Pole Attachment Order*, 26 FCC Rcd at 5306 (¶ 153 & n.458); *Consolidated Partial Order*, 16 FCC Rcd at 12131-32 (¶ 55); *see also id.* at 12122 (¶ 31) (the Commission's rate formulas "determine the maximum just and reasonable rate *per pole*") (emphasis added).

[51] *See* 47 C.F.R. § 1.1406(d)(2).

[52] *See* Compl. Ex. A at ATT00005-06 (Rhinehart Aff. ¶¶ 8-10) (showing space factor calculation); *see also* 47 U.S.C. § 224(d)(2) (requiring "equal apportionment of [unusable space] costs among all attaching entities").

allow FPL to significantly over-recover for the unusable space by double-collecting (or more) from certain attachers.

2. Mr. Kennedy Incorrectly Calculates AT&T's Overpayments.

22. In my prior Affidavit, I calculated AT&T's overpayments as compared to just and reasonable rates by comparing the net rental amount that AT&T has paid FPL to the net rental amount that AT&T would have paid if both companies paid proportional new telecom rates. My overpayment calculation, attached as Exhibit R-4, showed that AT&T overpaid FPL by [redacted] in net pole rent for the 2014 through 2018 rental years using proportional new telecom rates. I also calculated AT&T's overpayments as compared to the net rental amount that AT&T would have paid if both companies paid proportional rates calculated using the FCC's pre-existing telecom rate formula. My overpayment calculation, included in Exhibit R-4, showed that AT&T overpaid FPL by [redacted] in net pole rent for the 2014 through 2018 rental years as compared to proportional pre-existing telecom rates.

23. Mr. Kennedy disputes these calculations, contending that AT&T's overpayment compared to new telecom rates for the 2014 through 2018 rental years was [redacted], and that AT&T did not overpay as compared to pre-existing telecom rates.[53] Mr. Kennedy distorts his calculation to achieve these understated results, and my calculations remain the correct valuation of AT&T's overpayments for the 2014 through 2018 rental years.

24. *First*, Mr. Kennedy's overpayment calculations incorporate all of the errors detailed above with respect to Ms. Deaton's rate calculations, as he accepts and uses Ms. Deaton's improperly inflated rates for AT&T's use of FPL's poles.[54]

[53] Answer Ex. A at FPL00020-21, FPL00119 (Kennedy Decl. ¶ 38 & Ex. K).

[54] *Id.* at FPL00020 (Kennedy Decl. ¶ 38).

25. *Second*, Mr. Kennedy's overpayment calculation does not match [redacted]

26. *Third*, Mr. Kennedy provides meaningless overpayment calculations because he pairs my properly-calculated and proportional new and pre-existing telecom rates for FPL's use of AT&T's poles with Ms. Deaton's inflated and improperly-calculated new and pre-existing telecom rates for AT&T's use of FPL's poles.[56] This is a worthless exercise because it fails to pair proportional rental rates as the Commission intended.[57]

27. Indeed, it is noteworthy that Mr. Kennedy does not simply accept my new and pre-existing telecom rate calculations for FPL's use of AT&T's poles. Instead, he relies on Ms. Deaton, who agrees that I properly applied the FCC's new and pre-existing telecom rate formulas when calculating rates for FPL's use of AT&T's poles (with the exception of a [redacted] limited to the 2016 rental year).[58] The fact that Ms. Deaton agrees that I properly followed the Commission's rate formulas when calculating rates to be charged FPL for the 2014 through 2018 rental years, coupled with the far lower FCC rates that FPL has calculated for

[55] *Id.* at FPL00119 (Kennedy Decl., Ex. K); *see also* Compl. Ex. B at ATT00051 (Miller Aff. ¶ 7); Compl. Ex. 2 at ATT00147 (2018 Invoice).

[56] *See* Answer Ex. A at FPL00020 (Kennedy Decl. ¶ 38); Answer Ex. D at FPL00156-57 (Deaton Decl. ¶¶ 10-11).

[57] *See Pole Attachment Order*, 26 FCC Rcd at 5337 (¶ 218 n.662).

[58] *See* Answer Ex. A at FPL00020 (Kennedy Decl. ¶ 38); Answer Ex. D at FPL00157 (Deaton Decl. ¶ 11); *see also* Compl. Ex. A at ATT00043-44 (Rhinehart Aff., Ex. R-3).

AT&T's competitors,[59] strongly suggests that Ms. Deaton's changes to the rate formulas when calculating rates for AT&T are opportunistic and designed to artificially increase rental rates in an effort to try to justify FPL's overcharges under the JUA.

28. That said, I disagree with Ms. Deaton's calculation of the proportional new and pre-existing telecom rates for FPL's use of AT&T's poles for the 2019 and 2020 rental years.[60] I did not include these rate calculations in my prior Affidavit because FPL has not yet invoiced AT&T for 2019 or 2020 rent. It remains premature to calculate the rates for the 2020 rental year, but I have calculated the proportional rates that would apply to FPL's use of AT&T's poles for the 2019 rental year, and they are included in Exhibit R-7, which provides a complete set of my proportional rate calculations for the 2014 through 2019 rental years.

29. The differences related to the 2019 and 2020 calculations are data based. Ms. Deaton's 2019 computations do not reflect updated inputs AT&T filed with the FCC in CC Docket No. 86-182 on August 27, 2018 and on August 30, 2019. The properly calculated proportional 2019 new telecom rate for FPL's use of AT&T's poles is $10.31 per pole and the proportional 2019 pre-existing telecom rate for FPL's use of AT&T's poles is $15.63 per pole. Ms. Deaton's 2020 calculations do not reflect AT&T's transition from Uniform System of Accounts (USOA) accounting to Generally Accepted Accounting Principles (GAAP) accounting in 2018, which necessitates the use of an implementation rate difference under FCC rules.[61]

[59] *See* FPL's Resp. to AT&T's Interrog. No. 5.

[60] *See* Answer Ex. D at FPL00157, FPL00164 (Deaton Decl. ¶ 11, Ex. RBD-1).

[61] *See* 47 C.F.R. § 1.1406(e).

B. FPL Has Misrepresented AT&T's Good Faith Negotiations.

30. As I stated in my prior Affidavit, I have personal knowledge of AT&T's good faith negotiations with FPL for a just and reasonable pole attachment rate. I attended two face-to-face meetings with executives from FPL, the first at FPL's headquarters on December 7, 2018 and the second at mediation on May 1, 2019.[62] Mr. Bromley, FPL Manager – Regulatory Services, attended both along with other FPL executives. I disagree totally and completely with Mr. Bromley's allegation that I, or any other member of the AT&T team, failed to participate fully and transparently in the rate negotiations.[63] I also entirely disagree with the many other unsupported allegations throughout FPL's pleadings stating that AT&T did not approach the negotiations in good faith and with the express request to negotiate a "just and reasonable" rate for AT&T's use of FPL's poles.[64] These self-serving assertions are simply untrue.

31. Throughout the negotiations, AT&T and FPL had diametrically opposed views about AT&T's right to a just and reasonable rate for use of FPL's poles under the parties' joint use agreement ("JUA"). That disagreement was present from the beginning of the negotiations. Within a few months of FPL's issuance of the March 2018 invoice, FPL was on record that it "believe[d] that AT&T is misinterpreting the FCC Pole Attachment orders and their application to our Agreement," but agreed to have an executive-level meeting at its Juno Beach headquarters.[65] We scheduled the meeting for October 10, 2018, and asked for FPL's new

[62] The mediation was subject to a confidentiality agreement, so I will not disclose any specific statements made during the half-day mediation in this Affidavit.

[63] Answer Ex. C at FPL00147-150 (Bromley Decl. ¶¶ 1-15).

[64] *See, e.g.*, Answer ¶¶ 14, 17, 23, 24, 27.

[65] Compl. Ex. 6 at ATT00173-74.

telecom rate calculations and license agreements in advance to inform our discussion.[66] FPL refused, taking the position that they were irrelevant to the rate charged AT&T.[67]

32. FPL postponed the October meeting in anticipation of Hurricane Michael, and it took place on December 7, 2018. At the meeting, I inquired about apparent inconsistencies in the way that FPL calculated the rates it invoiced and emphasized that AT&T was seeking just and reasonable rental rates under the JUA, which requires compliance with federal law. FPL's representatives expressed the view that they did not need to discuss federal law unless AT&T made a formal request pursuant to a provision in the JUA that would automatically terminate the JUA 6 months thereafter. FPL's position seemed intentionally designed to increase FPL's leverage in the negotiations by trying to prod AT&T into terminating the JUA, which FPL would then use to complicate and increase the expense of AT&T's future deployment in Florida. But FPL's position was at odds with the JUA, and so we pointed them to the JUA's requirement that the invoiced rates be "at all times … in conformity with all applicable provisions of law."[68]

33. Throughout the remaining negotiations, FPL continued to use this procedural device to try to avoid discussing just and reasonable rates for AT&T. Mr. Bromley continues the trend in his declaration, claiming that "AT&T never requested that FPL renegotiate the 1975 JUA rates" and that "AT&T stated that it was not asking to renegotiate" that rate.[69] But what AT&T did ask repeatedly for was a JUA rental rate that complies with federal law, as required by federal law and the plain language of the JUA.

---

[66] *See* Compl. Ex. 8 at ATT00179.

[67] *See* Compl. Ex. 10 at ATT00188.

[68] *See* Compl. Ex. 1 at ATT00119.

[69] Answer Ex. C at FPL00149 (Bromley Decl. ¶¶ 11, 12).

34. Mr. Bromley is also disingenuous in his claim that FPL did not understand the rates that AT&T was seeking.[70] We made clear that AT&T was seeking new telecom rates, unless FPL could show that a higher rate was justified under the Commission's rigorous evidentiary standard. FPL refused to disclose the new telecom rates it charges, its new telecom rate calculations, or any support for a higher rate in spite of our repeated requests. I find it particularly disingenuous that FPL now claims that "FPL would have presented AT&T with the same information … that it now presents to the Commission" had AT&T requested that information during the parties' negotiations.[71] We requested that information time and again, but FPL refused to provide it.

35. Indeed, that was one aspect of our negotiations that I found especially frustrating was FPL's refusal to disclose its new telecom rates and calculations. It was not unreasonable for us to ask for this information. By rule, FPL is required to supply "all information necessary" to calculate rates using the FCC's formulas within 30 days of a request from a CLEC or cable company.[72] And the Commission's 2011 *Pole Attachment Order* and 2018 *Third Report and Order* both make the new telecom rate relevant to the determination of a just and reasonable rate for an ILEC.[73] But FPL refused to disclose its new telecom rate and calculations during our negotiations—thereby forcing AT&T to file a pole attachment complaint to obtain the information that should have been part of a good faith effort to resolve this dispute.

---

[70] *See id.* (Bromley Decl. ¶¶ 11, 14).

[71] *See* FPL Br. at 20.

[72] 47 C.F.R. § 1.1404(f).

[73] *Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126); *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217).

36. By refusing to simply disclose the new telecom rates and calculations that FPL finally disclosed in this complaint proceeding, FPL complicated and extended the negotiations and made them more costly for AT&T and more burdensome for my team. It fell on us to find and interpret FPL's publicly available data, and it was impossible to know the confidential aspects of FPL's calculations. I find it particularly ironic that FPL now complains that AT&T did not provide new telecom rate calculations for use of FPL's poles, when FPL was the only party to our negotiations that knew what new telecom rates FPL was charging AT&T's competitors.

37. I also take issue with the suggestion that AT&T somehow dragged out the negotiations or "remained silent" during the parties' negotiations.[74] Mr. Bromley admits that the parties discussed FPL's March 2018 invoice twice in April 2018.[75] The negotiations then proceeded apace, though AT&T was of course amenable to accommodating FPL's schedule. As noted above, FPL requested that we postpone the October 10, 2018 executive-level meeting for about 2 months due to Hurricane Michael. AT&T also agreed to a later mediation date to accommodate the schedule of a mediator proposed by FPL.[76] But AT&T never improperly delayed the negotiations, and it paid the invoiced rental amounts—though AT&T still disputed that the rental rates on which they were based were just and reasonable—when it was clear that the parties would not resolve their differences through the executive-level negotiation and non-binding mediation processes. AT&T participated in the entire process in good faith and with a sincere desire to avoid the need for this complaint proceeding.

---

[74] *See, e.g.*, Answer Ex. C at FPL00148-149 (Bromley Decl. ¶¶ 9, 10, 12, 14).

[75] *Id.* at FPL00148 (Bromley Decl. ¶ 8).

[76] *See* Compl. Ex. 21 at ATT00224-225.

38. It is also noteworthy that Mr. Kennedy did not attend the December 7, 2018 face-to-fact meeting or the May 1, 2019 mediation. His claim that "AT&T never made the effort to seek comparable treatment" to AT&T's competitors should therefore be readily rejected.[77] AT&T repeatedly sought rental rates that would be competitively neutral with the rates charged AT&T's competitors. FPL steadfastly and unreasonably refused to discuss those rates, which necessitated this pole attachment complaint proceeding.

C. FPL's Defense of the JUA Rates Is Flawed And Inconsistent With Data.

39. FPL's pleadings include additional costing claims that are hypothetical and are refuted by actual cost data. For example, FPL claims that AT&T "does not actually invest in its pole network."[78] This absurd claim is contradicted by AT&T's publicly reported pole investment data, which FPL relied upon to calculate proportional rates for its use of AT&T's poles.[79] AT&T Florida's reported investment in poles at the end of 2017 as shown in Exhibit R-7 was over $252 million. This compares to an investment of $194 million at the end of 2007, the last year AT&T Florida reported data under the FCC's Automated Reporting Management Information System (ARMIS).

40. One of FPL's primary arguments is similarly divorced from reality. FPL claims that, without the JUA, FPL would have installed poles that were 10-feet shorter, and that AT&T should, therefore, pay rates that account for the current-day cost difference between a 35-foot and a 45-foot pole.[80] This claim is not credible for several reasons, three of which are

[77] *See* Answer Ex. A at FPL00020 (Kennedy Decl. ¶ 36).

[78] FPL Br. at 63-64.

[79] *See* Answer Ex. D at FPL00164 (Deaton Decl., Ex. RBD-1).

[80] *See, e.g.*, Answer Ex. D at FPL00005-06, FPL00030, FPL00032 (Kennedy Decl. ¶ 9 & Ex. C).

particularly striking. First, FPL ignores that the network has developed over time, when pole costs were lower and when AT&T was paying far higher rental rates than its competitors. FPL includes no offsets or adjustments to account for these realities. Second, FPL's valuation assumes that AT&T requires a 45-foot pole in order to attach. But a review of the data supplied by FPL's contractor, Robert Murphy,[81] shows that of the wood and concrete distribution poles to which AT&T is allegedly attached, over 65% are 40-foot poles or shorter and over 29% are 35-foot poles or shorter.[82] Third, a comparison of this data with FPL's continuing property records shows that AT&T is not the driver of the height of FPL's poles. Mr. Murphy's file shows that of the wood and concrete distribution poles to which AT&T is allegedly attached, over 87% are 45-foot or shorter poles. FPL's continuing property records similarly show that, systemwide, [redacted].[83] AT&T's attachment to about [redacted] FPL poles that are 45-foot or shorter[84] cannot be the reason for FPL's system wide deployment of [redacted].

41. Another hypothetical valuation that conflicts with data relates to land rights. FPL posits that AT&T benefits by over [redacted] annually because the JUA "requires the pole owner to obtain rights-of-way for the joint user, to the extent that they are able to obtain those rights."[85]

[81] Answer Ex. E at FPL00170, FPL00218-259 (Murphy Decl. ¶ 22 & Ex. C).

[82] *See* FPL's Resp. to AT&T's Interrog. No. 10 (FPL-007691).

[83] *See* Compl. Ex. 26 at ATT00268-269.

[84] FPL's 2018 invoice charged AT&T for use of 420,914 wood and concrete distribution poles. [redacted]

[85] FPL Br. at 26 (citing Answer Ex. A at FPL00012-13 (Kennedy Decl. ¶ 17)).

Setting aside the fact that Mr. Kennedy premises this allegation on easements that also extend to "all carriers providing telecommunications services" and on permits for access to the public rights-of-way even though "most agencies do not charge a permit fee for aerial attachments," Mr. Kennedy's [redacted] annual valuation is a particularly inflated and fanciful hypothetical estimate.[86] This is apparent because the types of costs Mr. Kennedy describes appear to be costs that would largely be capitalized in FERC Account 360: Distribution Land and Land Rights.[87] The Commission, however, rejected electric utilities' request to include Account 360 when calculating pole attachment rates, explaining that "[e]ven if some costs associated with the land or right of way on which the poles are placed are included in this account …, the utility is enjoying the full use of those rights and the attacher's physical occupation of a portion of space on a pole does not restrict the utility's use of the land for its distribution network."[88]

42. Nevertheless, to test Mr. Kennedy's hypothetical valuation, I compared FPL's FERC account balances for Account 360 at the beginning of 2014 and the end of 2018, reflecting the applicable 5-year statute of limitations period. At the beginning of 2014, FPL had $91,276,635 invested in distribution plant land and land rights.[89] By the end of 2018, that figure had risen to $98,385,369, a difference of only $7.1 million over a period of 5 years.[90] And this

[86] Answer Ex. A at FPL00012-13 (Kennedy Decl. ¶ 17).

[87] *See* 18 C.F.R. § Pt. 101 (Account 360 description: "This account shall include the cost of land and land rights used in connection with distribution operations.").

[88] *Consolidated Partial Order*, 16 FCC Rcd at 12162 (¶ 123); *see also id.* ("The ratio of space occupied used to determine the capital pole investment allocable to the attachment bears no relationship to the portion of land on which the pole sits in relation to the entire inventory of square footage included in Account 360.").

[89] *See* 2014 FERC Form 1, page 206, line 60b.

[90] *See* 2018 FERC Form 1, page 207, line 60g.

$7.1 million amount over 5 years would have benefited the totality of FPL's $17.2 billion distribution plant,[91] not just the $1.9 billion invested in its entire distribution pole network,[92] and certainly not just for the benefit of AT&T. Mr. Kennedy's annual estimate is not just imagined, but is simply incredible. It too should be afforded no weight.

43. Finally, the data refutes the alleged "advantage" FPL touts regarding the wood distribution pole rates that AT&T pays as compared to the rates that other ILECs pay. According to FPL, AT&T's predecessor negotiated a reduction in its "ratio of pole cost responsibility" from 50% to 47.4%.[93] Mr. Kennedy then provides his alleged computation of the supposed benefit to AT&T from this change as compared to other ILECs which, he says, continued to pay wood distribution rates equal to 50%.[94] What Mr. Kennedy fails to discuss is the [redacted] rate AT&T has been paying for concrete poles (referred to by FPL as "special poles") as compared to other ILECs, as disclosed in FPL's responses to AT&T's Interrogatories.[95] My analysis of the difference in the concrete distribution pole rates among ILECs shows that any difference AT&T paid with respect to wood distribution pole rates was [redacted]. The following table shows my analysis:[96]

[91] 2018 FERC Form 1, page 207, line 75g.

[92] 2018 FERC Form 1, page 207, line 64g.

[93] FPL Br. at 50; Answer Ex. A at FPL0004-5 (Kennedy Decl. ¶ 8).

[94] *Id.*

[95] *See* FPL's Resp. to AT&T's Interrog. No. 5.

[96] For inputs to table, *see* FPL's Resp. to AT&T's Interrog. No. 5; Compl. Ex. 2 at ATT00140-148 (Invoices); Compl. Ex. A at ATT00046 (Rhinehart Aff., Ex. R-4).

	2014	2015	2016	2017	2018
Wood Rate Charged AT&T	[redacted]				
Wood Rate Charged Other ILECs					
Difference					
Pole Counts Invoiced AT&T	358,680	360,693	364,279	366,434	366,924
Amount AT&T Paid Less Than Other ILECs' Wood Rate	[redacted]				
Concrete Rate Charged AT&T	[redacted]				
Concrete Rate Charged Other ILECs					
Difference					
Pole Counts Invoiced AT&T	30,438	35,695	43,380	47,421	53,990
Amount AT&T Paid Over Other ILECs' Concrete Rate	[redacted]				
Net Difference Between Rates Charged AT&T and Other ILECs	[redacted]				
5-Year Excess Cost to AT&T					[redacted]

Daniel P. Rhinehart

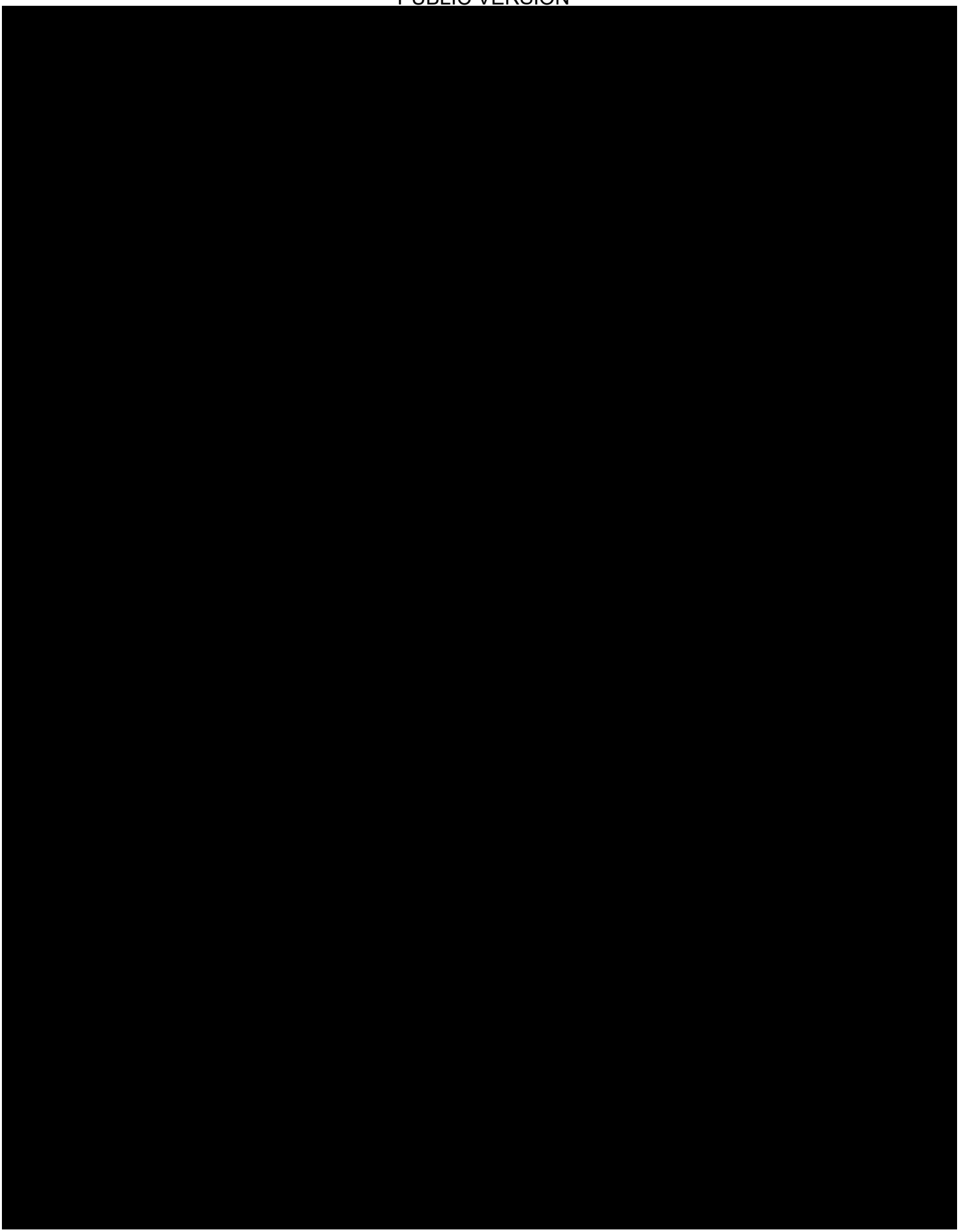
Daniel P. Rhinehart

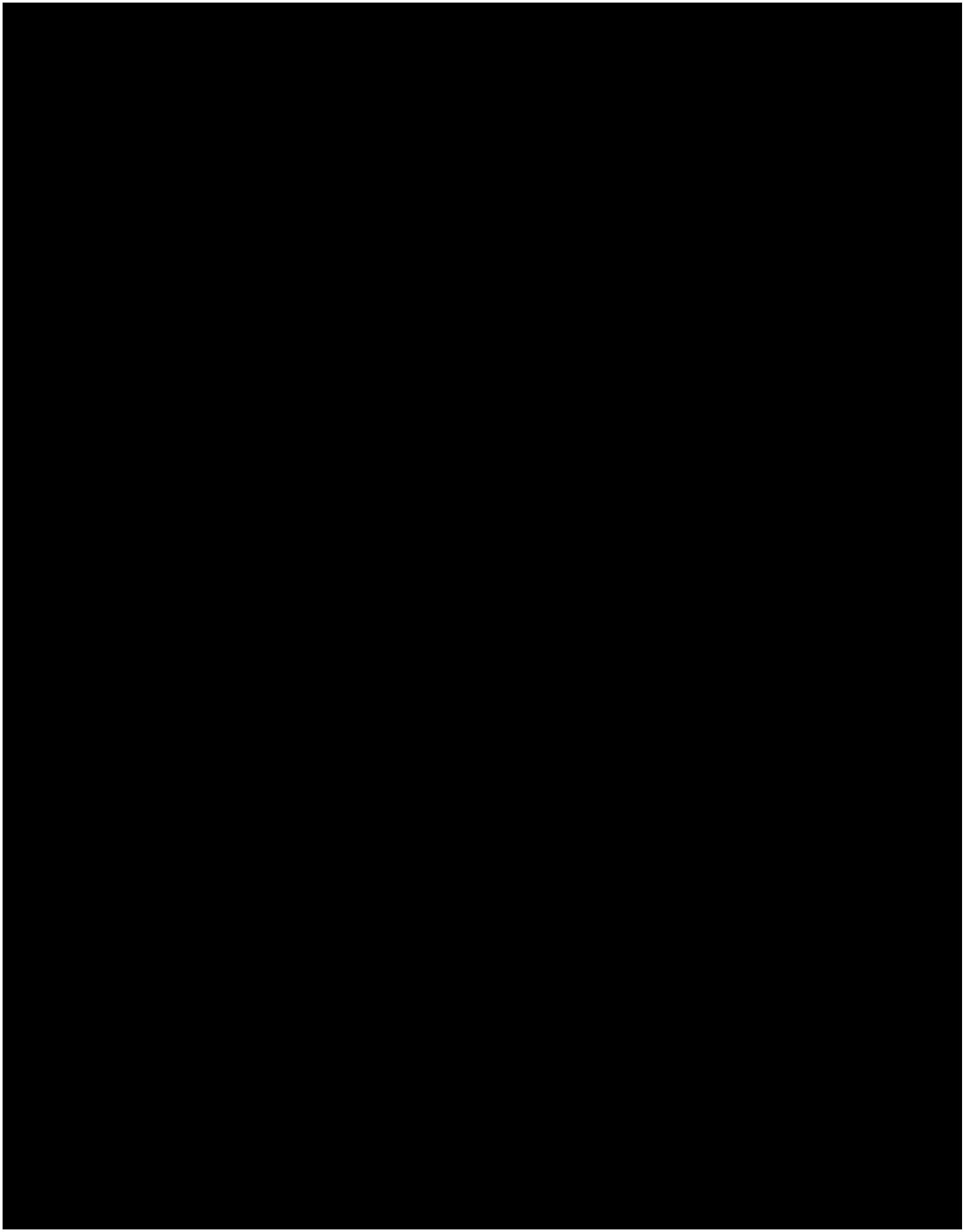
Sworn to before me on
this 5th day of November, 2019

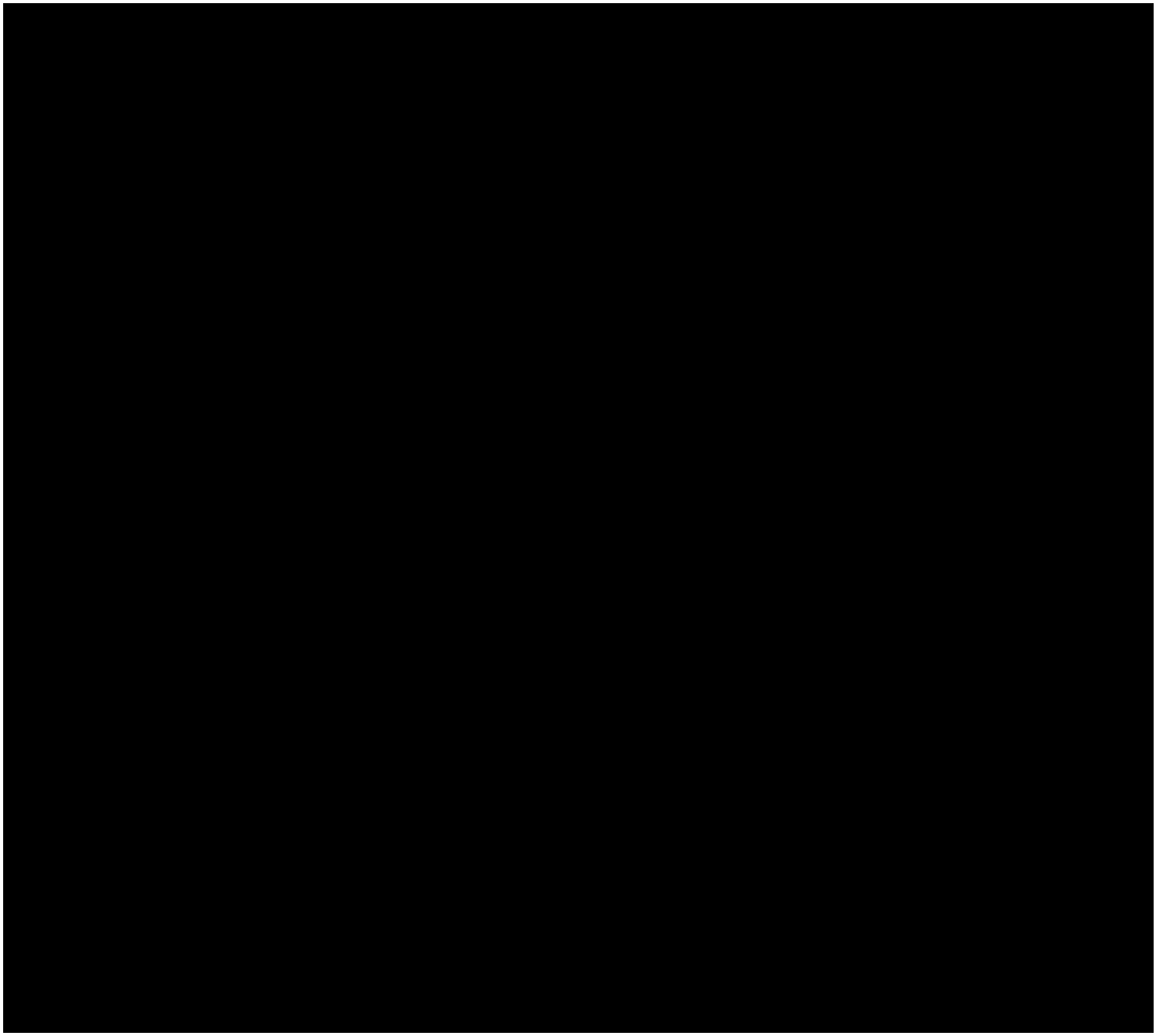
Notary Public Heather Ochs

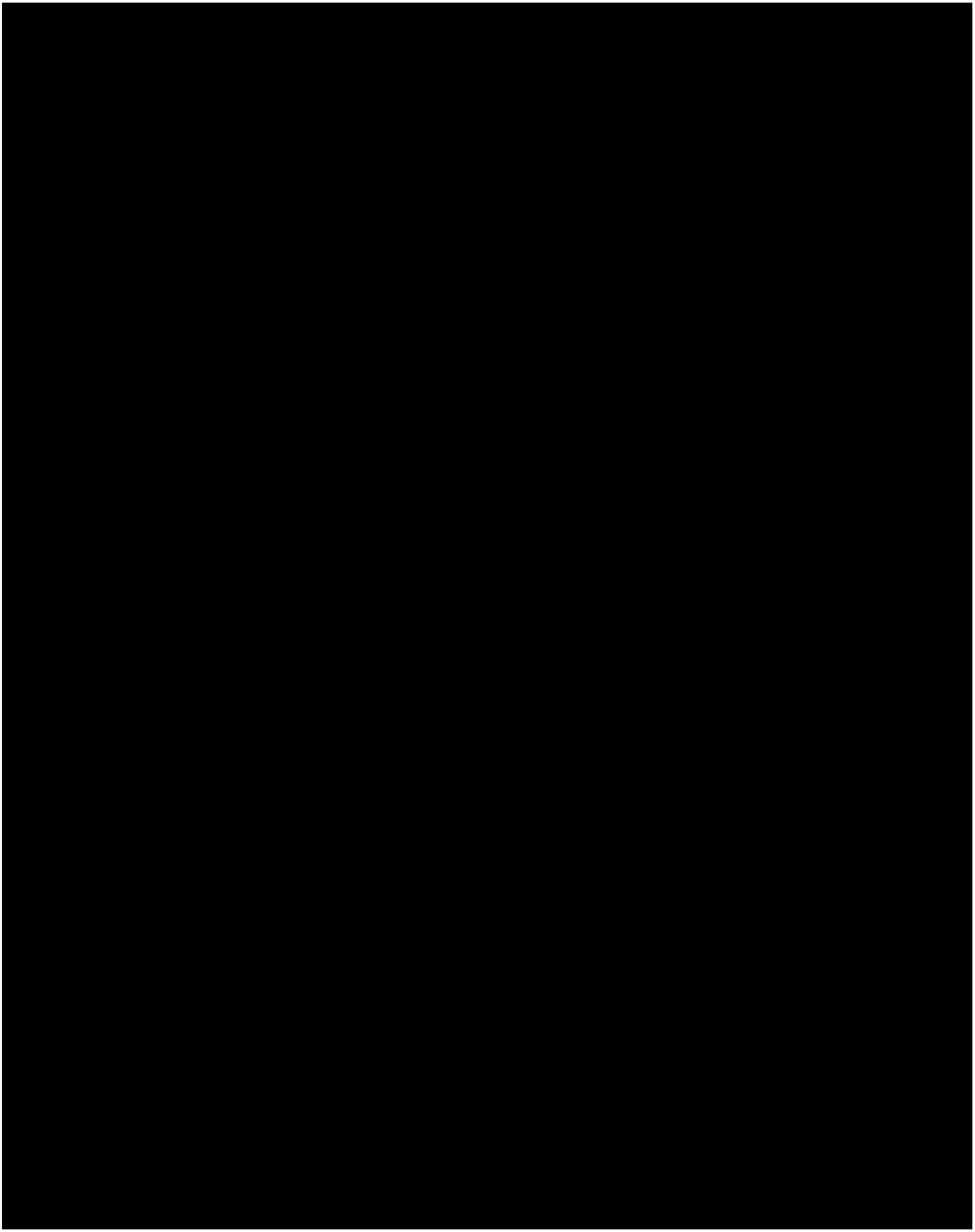
HEATHER OCHS
Commission Number 785852
My Commission Expires
September 2, 2020

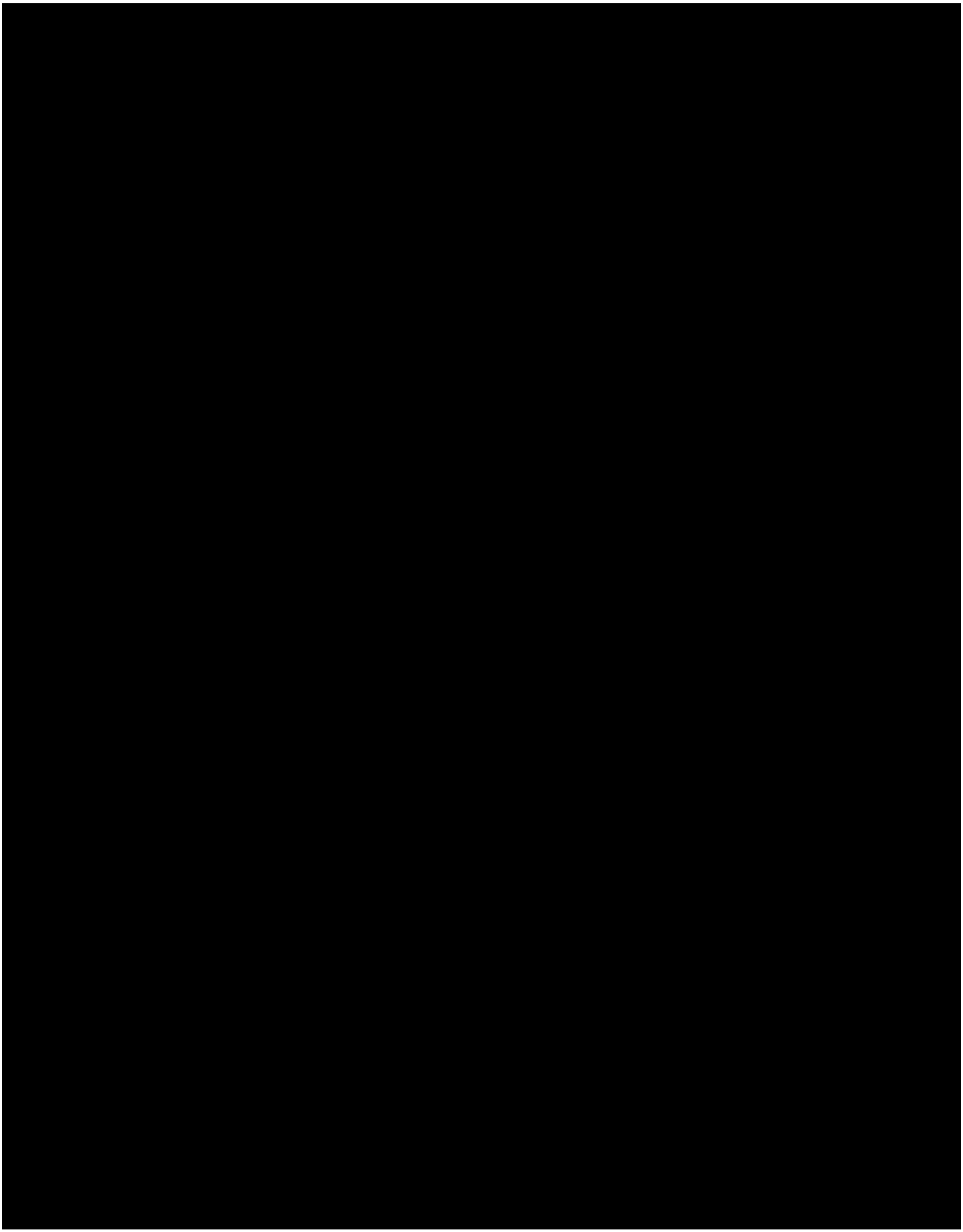
Exhibit R-5

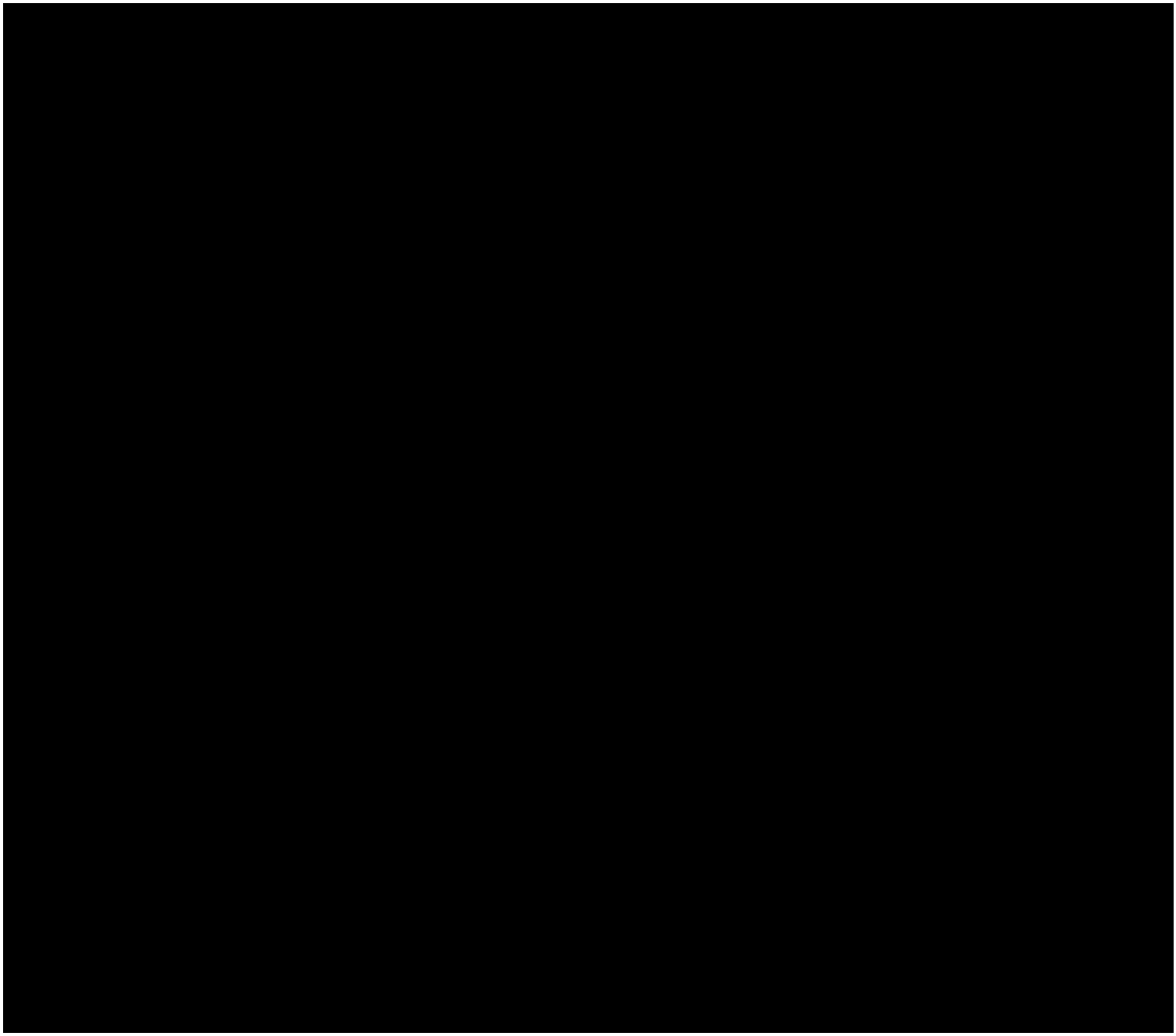


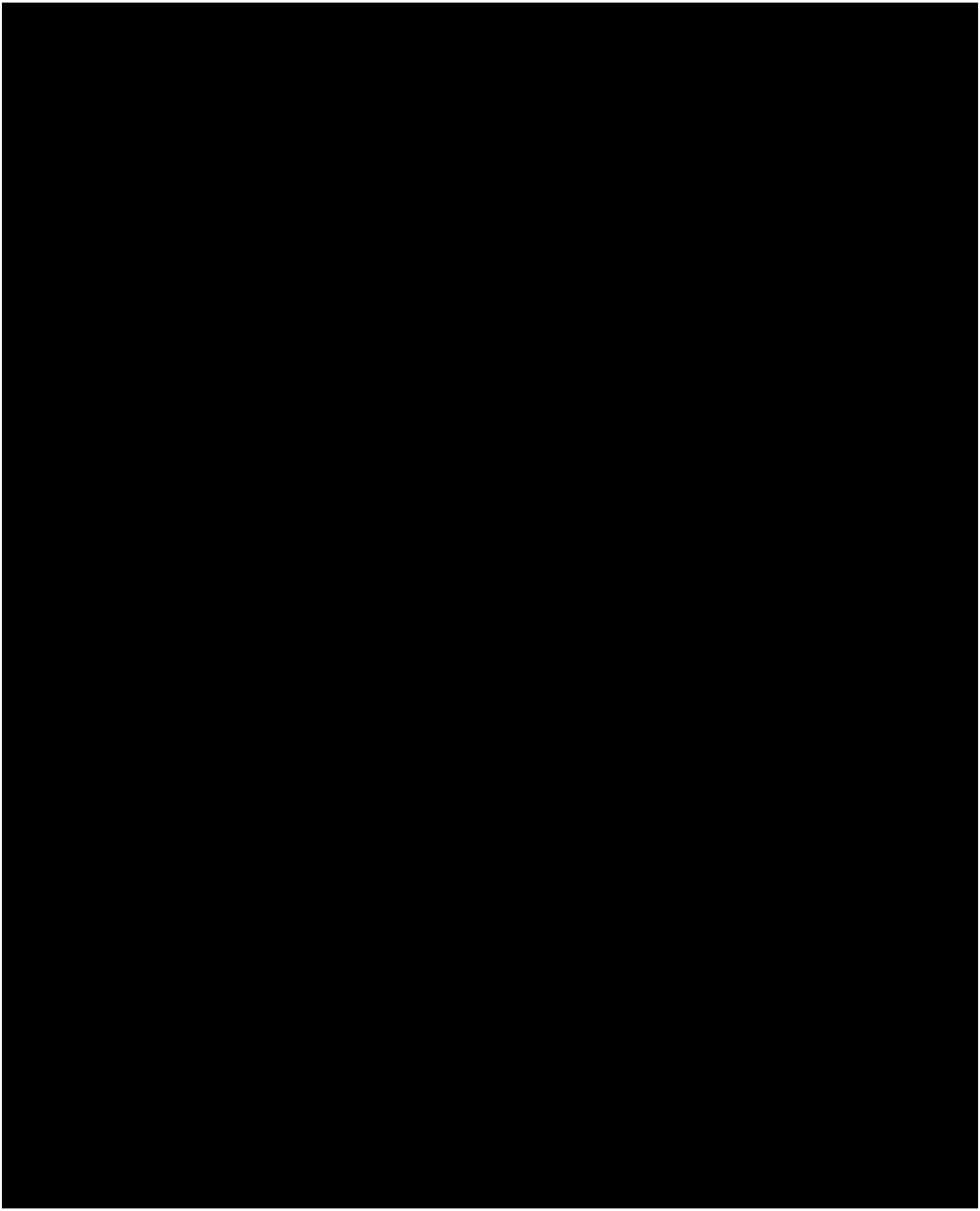


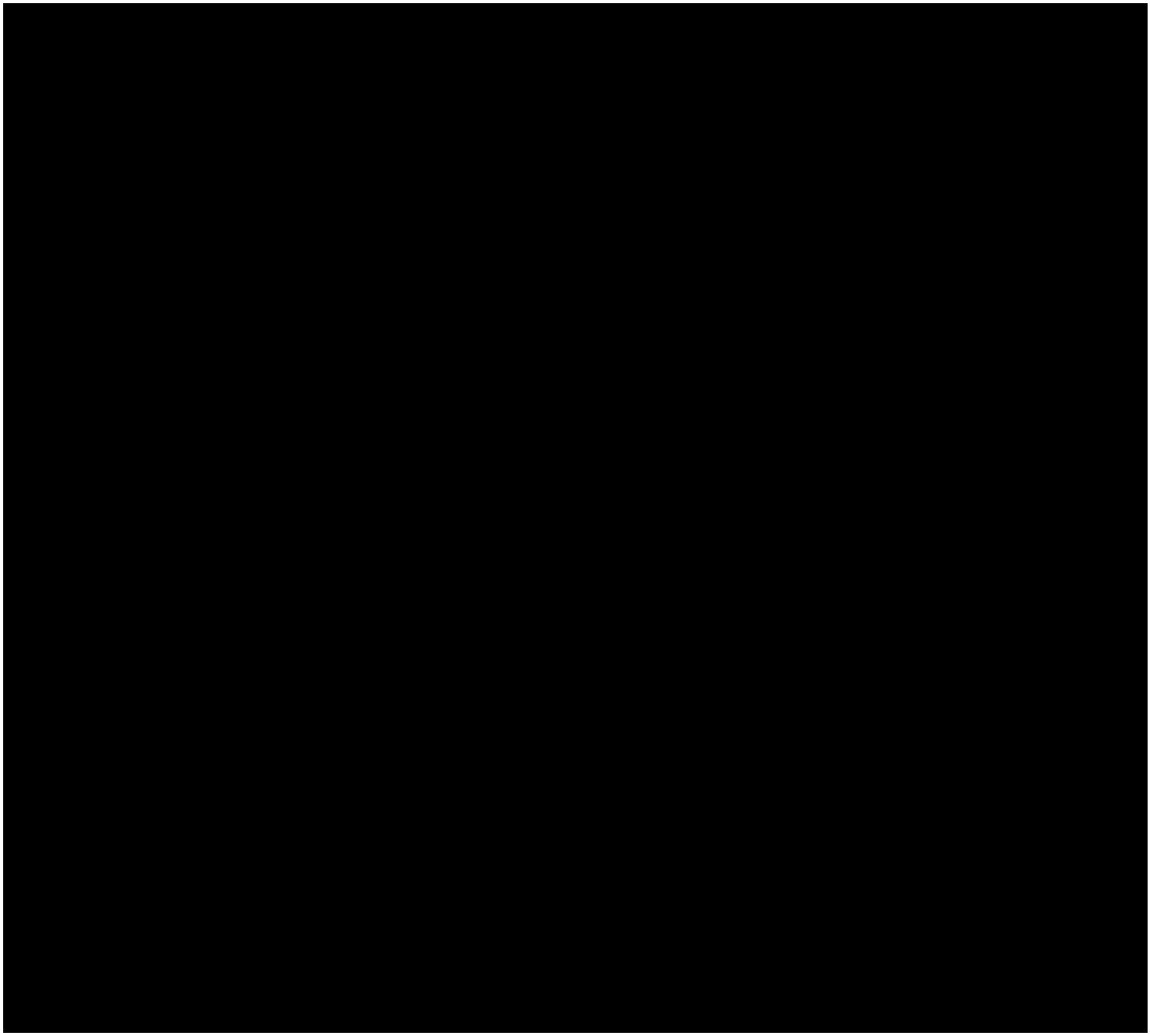


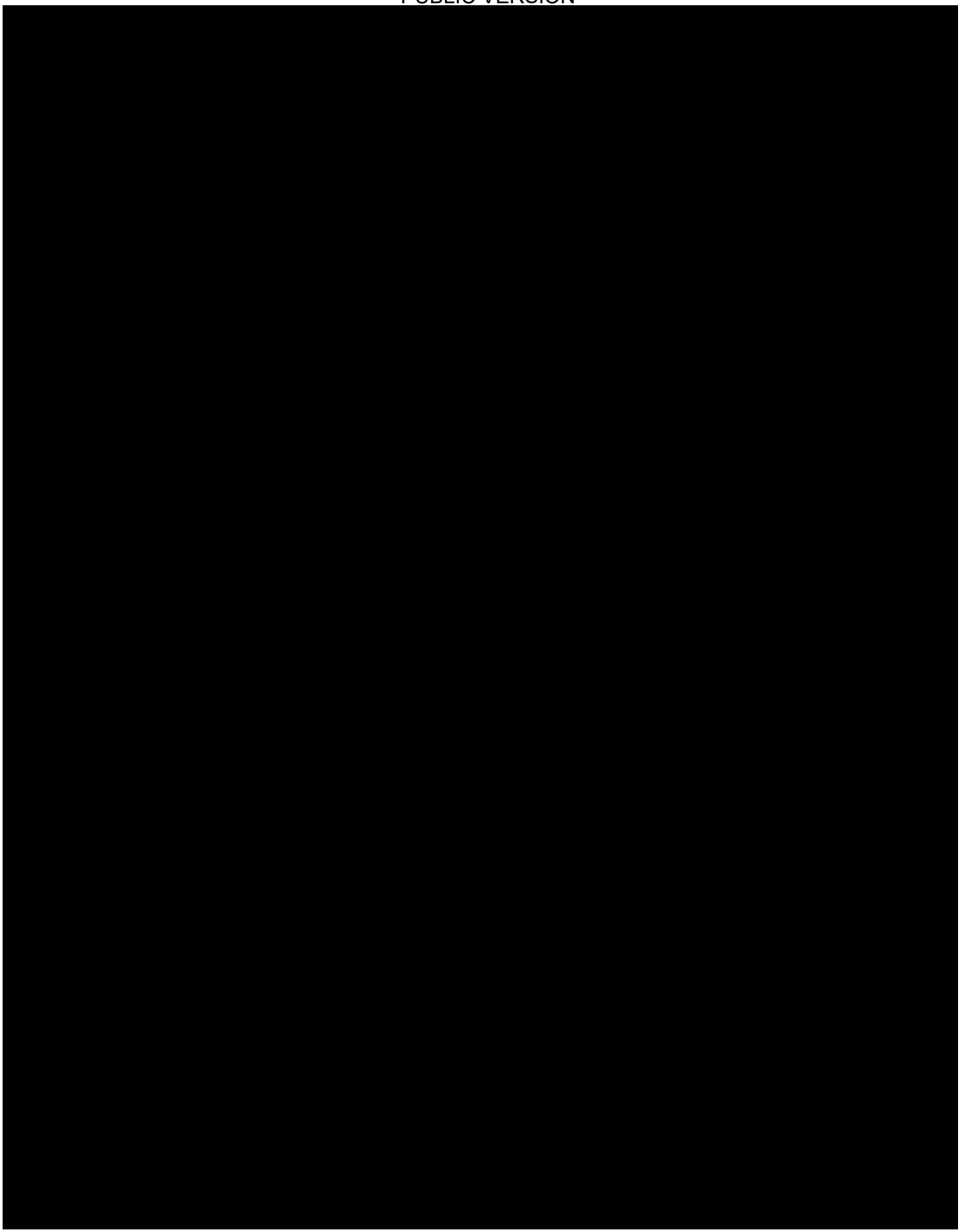












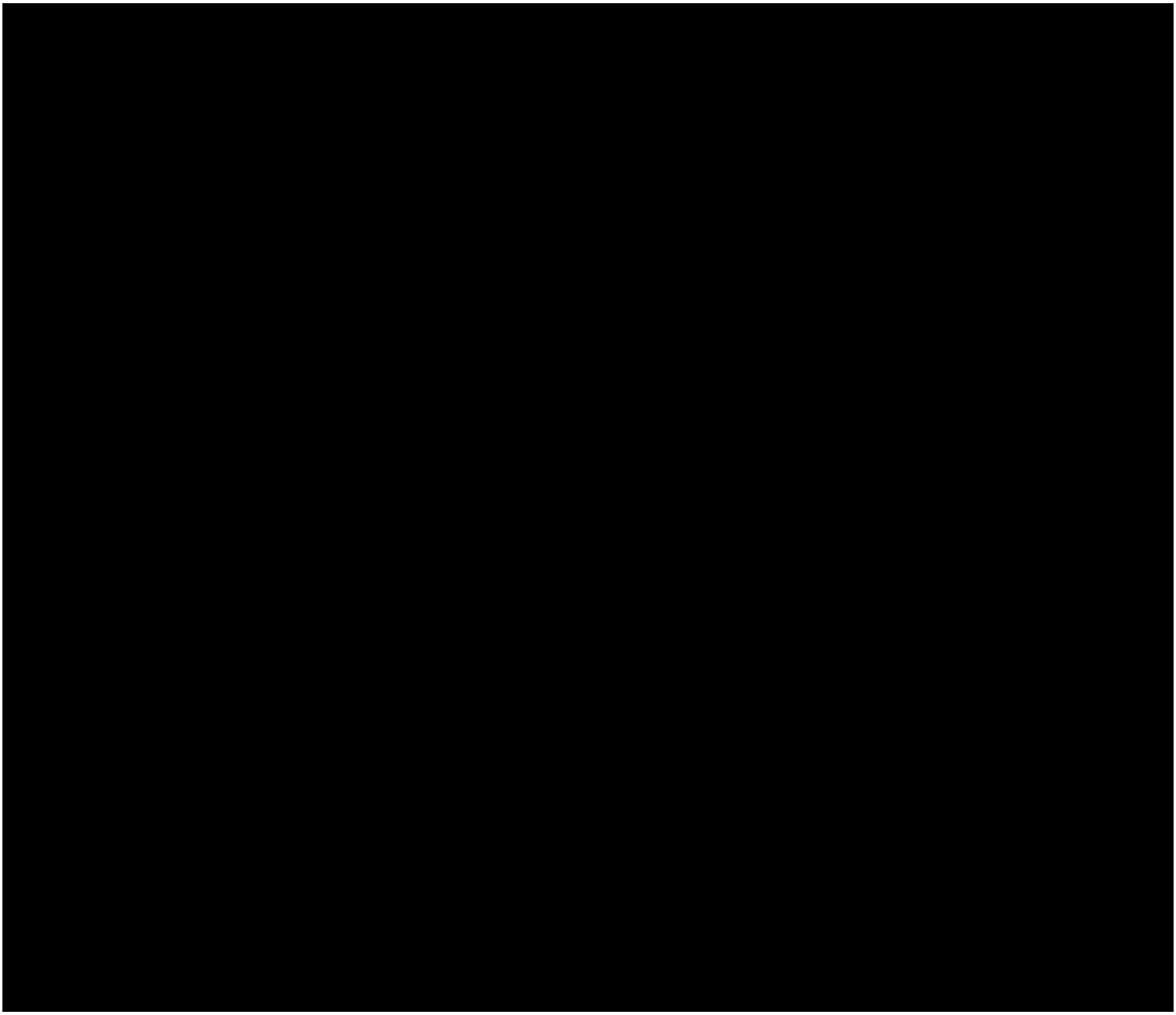


Exhibit R-6

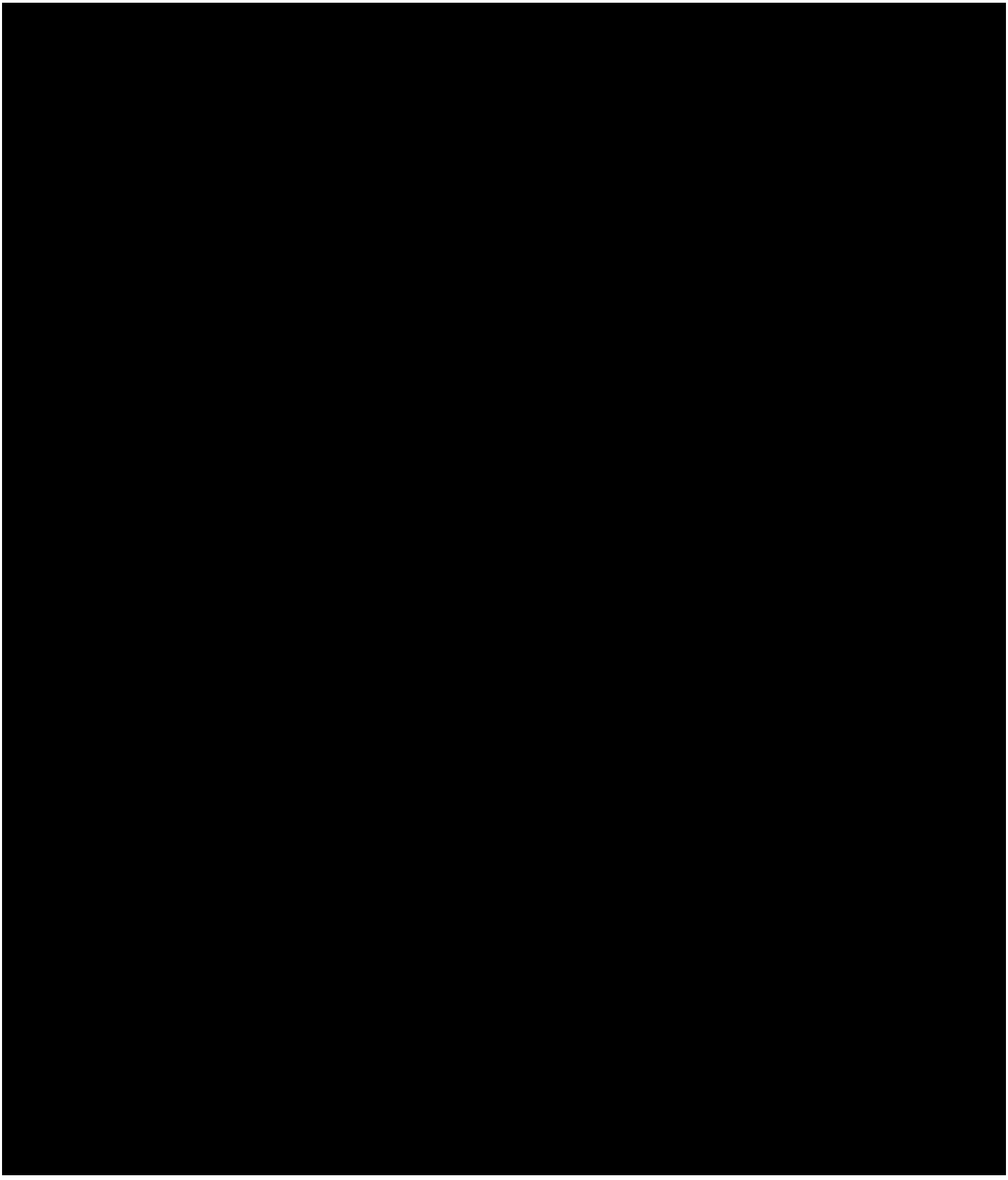


Exhibit R-7

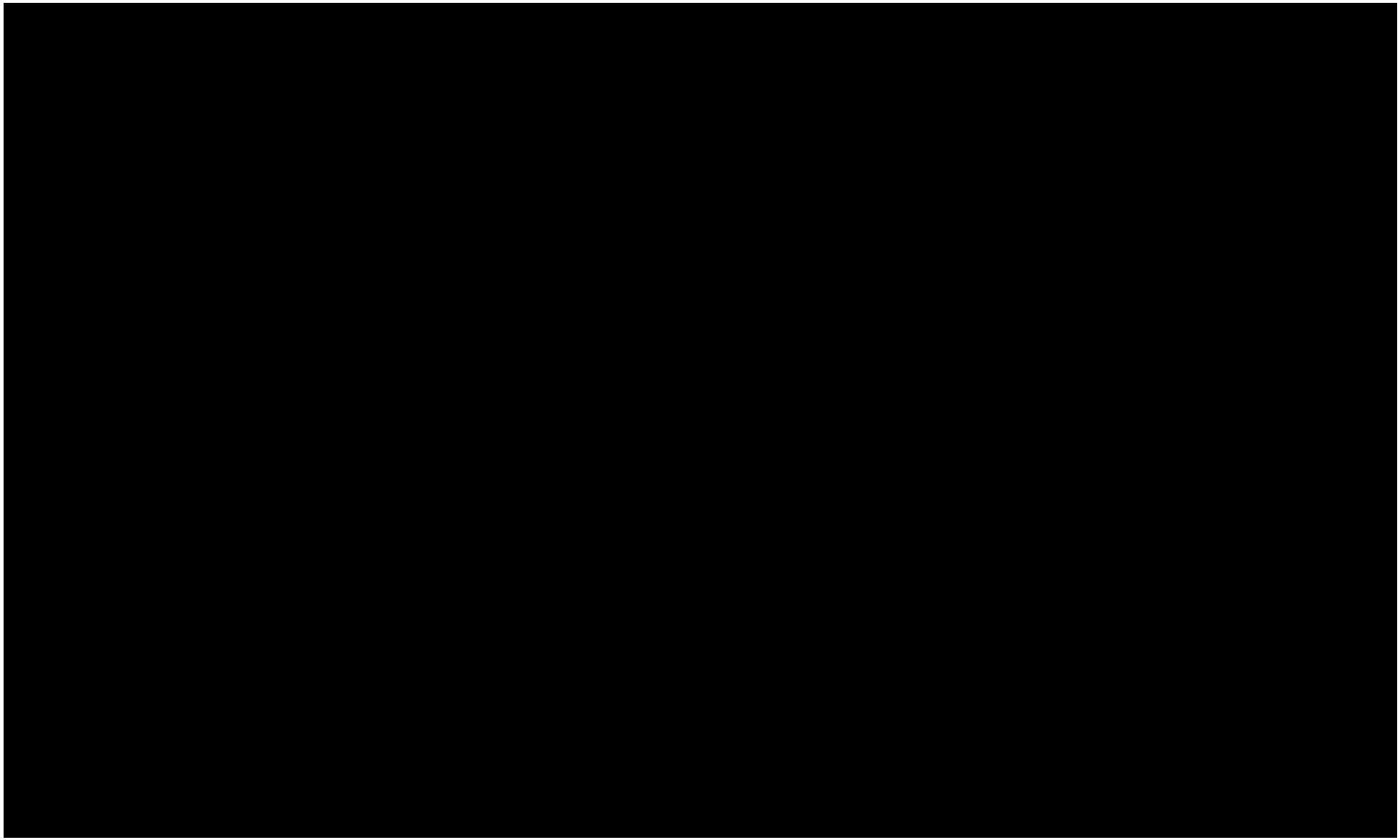


Exhibit B

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA, Complainant, v. FLORIDA POWER AND LIGHT COMPANY, Defendant.	Proceeding No. 19-187 Bureau ID No. EB-19-MD-006

REPLY AFFIDAVIT OF DIANNE W. MILLER
IN SUPPORT OF POLE ATTACHMENT COMPLAINT

STATE OF GEORGIA)
) ss.
COUNTY OF FULTON)

I, Dianne W. Miller, being sworn, depose and say:

1. I am employed by AT&T Services, Inc., a services affiliate of Complainant BellSouth Telecommunications, LLC d/b/a AT&T Florida ("AT&T"). As Director – Construction & Engineering with responsibility for the National Joint Utility Team, I support AT&T and AT&T-affiliated incumbent local exchange carriers ("ILECs") with respect to the negotiation and implementation of joint use agreements with investor-owned, municipal, and cooperative utilities. I executed a prior Affidavit dated June 27, 2019 in support of AT&T's Pole Attachment Complaint against Florida Power and Light Company ("FPL").[1] I am executing this Reply Affidavit to correct certain statements made by FPL in its September 16, 2019 Answer. I

[1] Compl. Ex. B at ATT00048-63 (Aff. of D. Miller, June 27, 2019).

know the following of my own personal knowledge and, if called as a witness in this action, I could and would testify competently to these facts under oath. I reserve the right to supplement or revise this Reply Affidavit as additional information becomes available.

2. As an initial matter, I disagree completely with FPL's allegation that AT&T negotiated with FPL in bad faith or failed to explain our request for just and reasonable rates.[2] I assumed responsibility for AT&T's rate negotiations with FPL in November 2018 when I became Director – Construction & Engineering with responsibility for the National Joint Utility Team. I approached, and at all times conducted, the negotiations with FPL in good faith and I know that the rest of the AT&T negotiating team did as well. AT&T also repeatedly explained to FPL our request for just and reasonable rates in person and throughout the parties' voluminous email correspondence regarding this rate dispute.

3. FPL is twisting our words when it incorrectly claims that AT&T "refused to renegotiate the rates" in the JUA.[3] Throughout our negotiations, FPL repeatedly asked whether AT&T was triggering a provision in the JUA related to formal renegotiation of the JUA rates, which would have automatically terminated the JUA after 6 months if the parties had not reached agreement on a new rental rate. AT&T did not need to invoke that provision to obtain just and reasonable rates because the JUA expressly requires rental rates that comply with federal law. AT&T did not want to trigger that provision because termination would increase AT&T's costs and impact deployment. And termination seemed inevitable if that provision were invoked based on FPL's reaction to AT&T's request for just and reasonable rates. We explained to FPL that the provision FPL was relying on did not apply, pointed FPL to the JUA provision that already

[2] The parties' May 1, 2019 mediation was subject to a confidentiality agreement, so I will not disclose any specific statements made during the half-day mediation in this Affidavit.

[3] *See, e.g.*, Answer ¶ 24.

requires just and reasonable rates, and repeatedly emphasized that AT&T was seeking a just and reasonable rate that was different from the exceptionally high rates FPL invoiced. FPL was fully aware of what AT&T wanted, but simply refused to negotiate.

4. I also disagree with FPL's unsupported claim that AT&T, without warning or explanation, simply stopped paying FPL's disputed invoices.[4] Even FPL admits that AT&T and FPL discussed the disputed March 5, 2018 invoice for 2017 rent within a month of its issuance.[5] After a fair amount of back and forth, in August 2018, FPL submitted the rental rate dispute to the JUA pre-complaint dispute resolution process. Throughout that process, FPL could not reasonably expect AT&T to pay disputed invoices that were the subject of active discussions. Indeed, FPL informed AT&T that it would not act on its unwarranted demand that AT&T remove its facilities from FPL's poles unless its demand for payment was not resolved "at the close of the mediation process."[6]

5. Under the JUA, the pre-complaint dispute resolution process continues for 60 days following that first day of non-binding mediation. AT&T was, of course, reluctant to pay the disputed invoices even at the close of the pre-complaint dispute resolution process because it seemed clear that FPL would resist any effort by AT&T to obtain refunds of its overpayments. AT&T's conclusion was well-founded because FPL has now made that very argument. Nevertheless, AT&T relied on FPL's representation that it would stop threatening removal of AT&T's facilities if AT&T paid the disputed invoices by the end of the dispute resolution process. And so, when it became clear that the parties would not resolve their differences within

[4] *See, e.g.*, Answer ¶ 6; FPL's Br. in Support of Its Answer ("FPL Br.") at 2, 9, 18-19.

[5] *See* FPL Br. at 9.

[6] Compl. Ex. 23 at ATT00250.

60 days of the May 1, 2019 mediation, AT&T processed payment of the disputed invoices. AT&T also prepared its pole attachment complaint seeking a just and reasonable rate and refunds of the disputed overpayments. But even though FPL received payment in full of the invoiced rentals, FPL continues to press forward with its complaint seeking payment of these amounts, has not dropped its demand that AT&T remove its facilities from FPL's poles, and continues to seek an injunction in Florida federal court.

6. I also disagree with FPL's claim that AT&T receives material benefits operationally that advantage AT&T over its competitors, let alone net material benefits that justify the exorbitantly high rates that FPL charges. FPL devotes much of its FCC filing to hypothetical claims about what FPL may have done decades ago if it was not required to share its poles with communications attachers. But FPL has long been required to provide cable television and telecommunications carrier access to its utility poles. FPL's speculation about what it could have done in a hypothetical world is irrelevant to setting pole attachment rates in today's competitive environment. FPL now shares its poles with an increasing number of communications attachers that compete with AT&T for the same customers using the same types of facilities on FPL's poles.

7. Indeed, FPL's reference to the "girth" of AT&T's cables is curious when FPL admits that its spot check of AT&T's facilities this summer produced a 1.18-foot value for AT&T's cables, even including 6 inches above and below AT&T's facility.[7] This confirms that AT&T's facilities, which include copper and lightweight fiber facilities, are essentially identical in size to its competitors' facilities, which are presumed to occupy 1 foot of space on FPL's

[7] Answer Ex. A at FPL00014 (Kennedy Decl. ¶ 25); Answer Ex. E at FPL00169 (Murphy Decl. ¶¶ 15, 16).

poles. AT&T has long been transitioning to lightweight fiber facilities. The following graph illustrates this transition by comparing the number of AT&T's annual aerial copper placements (green) to the number of its annual aerial fiber placements (black) since 1990 in Florida:

8. AT&T's network thus continues to significantly change and require even less space on FPL's poles. This is also apparent in data about the relative footage of AT&T cable and fiber cable placed since 1990 in Florida. The following graph shows that the footage of copper cable (green) that AT&T has placed in Florida has precipitously declined in recent years while the footage of copper cable removed (black) in Florida has increased. This is because copper cable is typically placed only when needed to repair a section of the copper cable network that has not yet transitioned to fiber. As more sections of the network transition to fiber, this decline in copper placements will continue.

9. FPL's focus on the 1970s should therefore have no bearing on the rental rates that are just and reasonable for today's network in today's competitive environment. It therefore remains my opinion that FPL has not identified anything that could justify charging AT&T a higher rental rate than applies to its competitors for use of FPL's poles.

Dianne W. Miller

Dianne W. Miller

Sworn to before me on
this 5th day of November, 2019

Notary Public

Chundra Rambert

Exhibit C

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA, Complainant, v. FLORIDA POWER AND LIGHT COMPANY, Defendant.	Proceeding No. 19-187 Bureau ID No. EB-19-MD-006

REPLY AFFIDAVIT OF MARK PETERS
IN SUPPORT OF POLE ATTACHMENT COMPLAINT

STATE OF TEXAS)
) ss.
COUNTY OF TARRANT)

I, Mark Peters, being sworn, depose and say:

1. I am employed by AT&T Services, Inc., a services affiliate of Complainant BellSouth Telecommunications, LLC d/b/a AT&T Florida ("AT&T"). As Area Manager – Regulatory Relations, I support AT&T and AT&T-affiliated entities with respect to regulatory, legislative, and contractual matters involving joint use, utility poles, conduit, and ducts. I executed a prior Affidavit dated June 27, 2019 in support of AT&T's Pole Attachment Complaint against Florida Power and Light Company ("FPL").[1] I am executing this Reply Affidavit to correct certain statements made by FPL in its September 16, 2019 Answer. I know the following of my own personal knowledge and, if called as a witness in this action, I could

[1] Compl. Ex. C at ATT00064-70 (Aff. of M. Peters, June 27, 2019).

and would testify competently to these facts under oath. I reserve the right to supplement or revise this Reply Affidavit as additional information becomes available.

2. As I stated in my prior Affidavit, I have over two decades of experience with AT&T-affiliated entities, which I refer to collectively as the "Company." For the past decade, I have been a subject matter expert on issues relating to the Company's joint use relationships with electric companies and since 2013, I have also provided support on matters relating to third-party access to Company-owned utility poles and conduit.

3. As the subject matter expert on issues relating to AT&T's joint use relationships, I have supported AT&T's effort to negotiate just and reasonable rates with FPL since the negotiations began. I attended AT&T's executive-level meeting with FPL on December 7, 2018 and the parties' non-binding mediation on May 1, 2019.[2] I strongly dispute FPL's claim that my participation, and the participation of the other team members representing AT&T, was in bad faith or somehow failed to provide FPL notice of the basis of AT&T's pole attachment complaint.

4. I approached the executive-level meeting and the non-binding mediation in good faith and with the goal of engaging in a productive discussion about rates that FPL must charge AT&T under federal law and the standard of competitive neutrality that the Commission adopted in its 2011 *Pole Attachment Order* and 2018 *Third Report and Order*. Instead, FPL was resolute in its position that it did not need to disclose or discuss the new telecom rate that FPL charges AT&T's competitors and refused to discuss federal law or the FCC's orders unless AT&T first agreed to effectively terminate the parties' Joint Use Agreement ("JUA") in 6 months. FPL

[2] The mediation was subject to a confidentiality agreement, so I will not disclose any specific statements made during the half-day mediation in this Affidavit.

relied on a rental rate renegotiation provision in Article XI of the JUA that, when triggered, automatically terminates the JUA if a new rental rate is not agreed upon within 6 months. I was convinced that the JUA would terminate if AT&T invoked that provision based on FPL's response to AT&T's request for just and reasonable rates, as FPL had simply declared the FCC's 2011 and 2018 *Orders* inapplicable to the JUA and stated that it had no affirmative duty to change the invoiced rates. It thus was apparent to me that FPL was trying to increase its leverage in the negotiations by trying to induce AT&T into terminating the JUA, which would necessarily impede deployment and increase AT&T's costs.

5. I did not see any reason for AT&T to take FPL's bait because formal renegotiation of the JUA rates under Article XI was not required for AT&T to receive the just and reasonable rates required by federal law. The JUA already requires just and reasonable rates under Article VI, which states that "[j]oint use of poles covered by this Agreement shall at all times be in conformity with all applicable provisions of law."[3] As the parties' correspondence shows, we repeatedly pointed FPL to this provision, but FPL nonetheless continued to reject any discussion of federal law, competitive neutrality, the new telecom rates it charges, and the Commission's 2011 and 2018 *Orders*.

6. FPL continues to try to hide behind the irrelevant Article XI renegotiation provision in its FCC filings, claiming that AT&T "refused to renegotiate the terms of the parties' agreement."[4] This is at best misleading, at worst disingenuous, and is in fact false. AT&T consistently, expressly, respectfully, and repeatedly asked FPL to negotiate and provide the just and reasonable rate required by federal law and the parties' JUA.

[3] Compl. Ex. 1 at ATT00119 (JUA, Art. VI).

[4] FPL's Br. in Support of Its Answer at 19 ("FPL Br."); *see also, e.g.*, Answer ¶¶ 17, 23, 27.

7. It is also not only false but silly to suggest that FPL "was never afforded the opportunity nor did FPL have the occasion to 'rebut the [new telecom rate] presumption' or identify [any alleged] 'advantage that AT&T enjoys over its competitors.'"[5] We asked FPL on numerous occasions to engage in this conversation, to provide copies of its license agreements, and to otherwise justify the rates it charges AT&T under standards adopted in the FCC's 2011 and 2018 *Orders*. But, as FPL admits, FPL instead "repeatedly explained to AT&T" that FPL believes that "neither order is applicable" to the JUA.[6] FPL therefore *chose* not to discuss the FCC's 2011 and 2018 *Orders* when it was asked to do so. FPL's decision was unfortunate because it necessarily eliminated any chance of a negotiated resolution of this dispute.

8. I was also surprised to see FPL's repeated false claim that it made "offers" to purchase AT&T's poles.[7] FPL never made an offer, formal or informal, to purchase AT&T's poles. As Thomas Kennedy, FPL Principal Regulatory Analyst, explains in the single paragraph supporting this allegation, Mr. Kennedy wondered aloud during the past few years about whether AT&T would be willing to sell its poles to FPL if FPL made an offer.[8] Mr. Kennedy did not follow up with a formal offer to purchase AT&T's poles, let alone propose a price for the poles.

9. FPL's reliance on Mr. Kennedy's pole ownership "idea" is also curious because Mr. Kennedy did not raise the idea during the face-to-face negotiations about this complaint. Indeed, Mr. Kennedy did not attend the parties' December 7, 2018 executive-level meeting or the May 1, 2019 non-binding mediation. He also did not inquire, nor did his colleagues inquire,

[5] Answer ¶ 14.

[6] *Id.* ¶ 14.

[7] *See, e.g.*, *id.* ¶¶ 23, 24, 30, 31; FPL Br. at 3.

[8] Answer Ex. A at FPL00020 (Kennedy Decl. ¶ 36).

about the possibility of a pole purchase in any correspondence leading up to or following those meetings, as evident from the correspondence attached to AT&T's Complaint.

10. I also think that it is noteworthy that Mr. Kennedy concedes that AT&T was open to receiving an offer from FPL to purchase poles, but clarified that any offer must guarantee new telecom rates for AT&T's use of FPL's poles and ensure continued uninterrupted access to FPL's poles like the statutory right of access enjoyed by AT&T's competitors.[9] Mr. Kennedy further admits that he was unwilling to commit to these preconditions.[10] It is preposterous to suggest that AT&T should have followed up and developed a formal proposal under these circumstances. The ball was squarely in FPL's court, and FPL knew that an offer to purchase AT&T's poles would need to place AT&T "on a level playing field with other telecom providers" if that offer was to have any chance of success.[11] Instead of making such an offer, FPL refused to even discuss a new rental rate for AT&T's use of FPL's poles and continues to try to eject AT&T from the over 425,000 FPL poles to which it is attached. FPL thus showed that AT&T's response to Mr. Kennedy's idea was the only possible response. Simply selling poles to FPL without guaranteed access and new telecom rates would subject AT&T to the exceptionally high JUA rates on more poles, make AT&T more dependent on FPL's infrastructure, and further increase FPL's negotiating leverage.

11. I also disagree with the substantive aspects of FPL's Answer and supporting brief and declarations. Nothing in FPL's filing, or its responses to AT&T's interrogatories, changes my conclusion that the JUA does not include more advantageous terms and conditions for AT&T

[9] *Id.*

[10] *Id.*

[11] *Id.*

than those that apply to AT&T's competitive local exchange carrier ("CLEC") and cable competitors. Consequently, AT&T should pay the same pole attachment rate as its CLEC and cable competitors. FPL did not attach any license agreements to its Answer or quote any terms or conditions from them. As a result, in reaching my conclusions, I considered the terms and conditions in the license agreements FPL produced in response to AT&T's interrogatories.[12]

12. As an initial matter, with limited exception, FPL relies on terms in the JUA that are reciprocal, meaning that AT&T must extend the same terms to FPL for its use of AT&T's poles. By contrast, FPL's license agreements do not impose reciprocal obligations on AT&T's competitors, and so this is a significant difference between the costs and obligations imposed on AT&T as compared to its competitors. FPL acknowledges that these reciprocal obligations exist, but it does not account for them at all because it says that FPL owns more poles than AT&T.[13] This does not make sense. FPL relies on terms that have equal effect on FPL and AT&T irrespective of their pole ownership numbers. For example, because FPL and AT&T have facilities on an equal number of joint use poles, FPL's argument about insurance coverage for facilities applies equally to the parties. Similarly, because each party has facilities on every joint use pole, the fact that each party completes its own post-installation inspections of its own facilities applies equally. FPL also relies on a security bond requirement that would apply equally to the parties for a different reason: FPL [redacted].[14] In either scenario, the provision would apply

[12] AT&T has included a representative sample of the agreements with its Reply. *See* Reply Exs. 1-4.

[13] FPL Br. at 65.

[14] *See, e.g.*, Reply Exs. 2, 3 & 4 ([redacted]); Reply Ex. 1 at FPL-000216 [redacted]

equally to AT&T and FPL, and the reciprocity is complete. But even if there are scenarios that FPL envisions, where reciprocity is proportional to pole ownership, an offset would still be required, and yet none is provided by FPL.

13. FPL also does not account for other added costs and responsibilities that are imposed on AT&T under the JUA, but not on its competitors under license agreements. Mr. Kennedy identifies one of them. He states that FPL replaces its poles when they are too old or must be relocated due to roadwork without contribution from AT&T or AT&T's competitors.[15] But AT&T does the same thing; it replaces its poles when they are too old or must be relocated due to roadwork and does not receive any contribution to the cost from FPL or AT&T's competitors. AT&T thus incurs costs that its competitors do not incur.

14. Another overarching problem with FPL's filing is that it ignores the impact of FPL's termination of the JUA as concerns the further granting of joint use. As I explained in my opening Affidavit, in negotiations to secure the just and reasonable rates to which ILECs are entitled under the law, electric utilities routinely allege advantages that merely reflect a difference in how attachers incur costs when they deploy their facilities, but such differences cannot exist, if they ever existed, once the JUA has terminated and AT&T is unable to attach to new FPL pole lines.[16] FPL relies on such advantages; for example, it points to differences in the permitting process and post-installation survey process that AT&T and its competitors follow

[15] Answer Ex. A at FPL00009-10 (Kennedy Decl. ¶ 14).

[16] Compl. Ex. C at ATT00068 (Peters Aff. ¶ 8). In my opening Affidavit, I stated that the JUA would terminate on August 26, 2019, the date FPL referenced in FPL's March 25, 2019 Notice of Termination. *Id.*; Compl. Ex. 23 at ATT00250. As was frequently the case throughout our negotiations, FPL's calculation was incorrect. The JUA termination provision requires 6 months' notice (not 5). Consequently, the JUA terminated on September 26, 2019—6 months after FPL's March 25, 2019 Notice. *See* Compl. Ex. 1 at ATT00128 (JUA, Art. XVI).

when attaching to a new pole line.[17] But FPL does not in any way account for the fact that AT&T *cannot* attach to new pole lines because the JUA is terminated and now in evergreen status. FPL's sole response is that rental rates are being set for use of existing poles with attachments that have already been deployed.[18] But that simply proves the point that I made in my opening Affidavit. Any possible value associated with a one-time difference in a process that occurred months, years, decades, or many decades ago when an attachment was placed has already been more than paid for in the far higher JUA rates that AT&T has paid to attach to FPL's poles for the past 4+ decades. There is no reason to charge AT&T higher annually recurring per-pole rates going forward to account for possible differences months, years, decades, or many decades ago that cannot occur in the future.

15. FPL is also wrong in asserting that the one-time operational differences it alleges ever justified a higher rate for AT&T than for its competitors. For example, under the JUA, AT&T incurs the cost of any work required pre-installation to determine whether and what make-ready is needed and the cost of any work required post-installation to confirm the attachment was properly made. Under the license agreements, AT&T's competitors apparently pay FPL permit costs so that FPL completes this same work.[19] But the cost for AT&T and its competitors should be about the same under either approach, so there is no basis for requiring AT&T to pay a higher annual rental rate to account for costs that AT&T already incurred. Similarly, under the JUA, AT&T pays make-ready costs that Mr. Kennedy admits cover all of

[17] Similarly, FPL relies on the "potential" that AT&T's competitors would pay a one-time [redacted] "unauthorized attachment fee" if they do not permit their attachments before attaching. *See* Answer Ex. A at FPL00013 (Kennedy Decl. ¶ 18). But if AT&T cannot attach to a new pole line, AT&T cannot incur a one-time unauthorized attachment fee.

[18] Answer ¶ 16.

[19] Answer Ex. A at FPL00010-12 (Kennedy Decl. ¶¶ 15-16).

FPL's "direct construction costs plus overheads that are required for the work."[20] Mr. Kennedy says that FPL collects additional "administrative and general expenses" from AT&T's competitors.[21] Mr. Kennedy is either mistaken or FPL appears to be double-collecting these administrative and general expenses from its licensees because administrative and general expenses are already included in a new telecom rental rate.[22]

16. Of course, I cannot know exactly what costs Mr. Kennedy is relying on because FPL did not support any of his allegations with actual data showing amounts invoiced and paid by AT&T's competitors. With respect to make-ready, Mr. Kennedy simply provides some high-level general numbers that do not show what work was performed or what costs were included.[23] FPL's interrogatory responses did not permit a better understanding. Mr. Kennedy, for example, claims that FPL charged AT&T's competitors about [redacted] for make-ready between 2014 and 2018, but FPL produced invoices for only about [redacted] in make-ready charges. They do not show [redacted]. FPL also failed to account for any payments made by AT&T for similar work, making the whole exercise appear designed to create the illusion of competitive value irrespective of real-world experience.

17. Mr. Kennedy's other valuations are based mostly on his guesses[24] and 3 estimates—for placement of a 35-foot pole, placement of a 45-foot pole, and replacement of a

[20] Answer Ex. A at FPL00013 (Kennedy Decl. ¶ 19).

[21] *Id.*

[22] *See, e.g.*, *In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12125 (¶ 44) (2001) ("Consolidated Partial Order").

[23] *See, e.g.*, Answer Ex. A at FPL00007 (Kennedy Decl. ¶ 10).

[24] *See, e.g.*, *id.* at FPL00008, FPL00012-13 (Kennedy Decl. ¶¶ 11, 17).

35-foot pole with a 45-foot pole.[25] These estimates do not reflect costs actually invoiced and paid by AT&T's competitors. And there is also no one-size-fits-all estimate that can cover all pole placements or replacements. For example, FPL increased the estimated cost of the pole replacement by assuming the pole is located in an inaccessible location.[26] Many poles are located on streets, alleyways, or locations accessible to pole-placing equipment, and so would not require the additional costs associated with an inaccessible location. FPL's pole replacement estimate also includes costs to transfer FPL's facilities and complete other work in addition to the pole replacement.[27]

18. The estimates are thus unrepresentative of most pole placement and replacement scenarios. They are also presented in a misleading manner. FPL contends that AT&T *avoided* make-ready and pole replacement costs. AT&T did not. Even Mr. Kennedy admits that if AT&T were to require FPL to complete make-ready work on its behalf, AT&T would pay FPL's "direct construction costs plus overheads that are required for the work."[28] Instead, FPL's argument is that AT&T "avoided" make-ready or pole replacement costs that FPL thinks AT&T might pay in a hypothetical world in which companies did not jointly use utility poles—but then AT&T (and only AT&T) sought to attach at today's costs. Then, FPL reasons, AT&T would have to replace all of FPL's poles with taller poles. That is make-believe.

19. Indeed, much of FPL's filing relates solely to a comparison between a hypothetical world in which FPL shares its poles with no one and one in which it does. That comparison is not relevant, however, to whether AT&T enjoys net material benefits relative to

[25] *See id.* at FPL00029-37 (Kennedy Decl., Exs. C, D).

[26] *Id.* at FPL00035 (Kennedy Decl., Ex. D).

[27] *Id.*

[28] *Id.* at FPL00013 (Kennedy Decl. ¶ 19).

AT&T's competitors that also use FPL's poles. Much of FPL's argument is, therefore, beside the point. For example, FPL argues that it has installed joint use poles that are "tall enough to accommodate more facilities than what is required to serve its electric customers."[29] Even if true, AT&T and its competitors both use FPL's joint use poles. And, based on the pole height information FPL provided, there should generally be space on FPL's joint use poles to accommodate AT&T and its competitors without requiring a pole replacement or significant make-ready. FPL also states that its average joint use pole height is 40.4 feet.[30] On poles of this height, little (if any) make-ready should be required before an attachment is made in the communications space. FPL deploys poles of similar height across its serving area, not solely in the areas jointly served by AT&T, illustrating that FPL's deployment decisions are not driven by the presence of AT&T's attachments. Indeed, FPL claims that its poles are 10-feet taller than they would be were FPL the only attacher. But it is ludicrous to suggest that FPL would be installing 30-foot poles across Florida absent joint use, particularly when it [redacted] under some of its license agreements.[31]

20. FPL's reliance on an average 40.4-foot height of its joint use poles also shines a spotlight on the hypothetical, unreasonable, and internally inconsistent nature of FPL's valuation of its allegations, which are based on the installation of 45-foot poles. The JUA does not require 45-foot poles. It states that a normal joint use pole is a 35- or a 40-foot pole.[32] And poles of these heights are sufficient to hold communications facilities for AT&T and its competitors. In

[29] *Id.* at FPL00003 (Kennedy Decl. ¶ 7).

[30] *Id.* at FPL00015 (Kennedy Decl. ¶ 28).

[31] *See, e.g.*, Reply Ex. 3 at FPL-002803; Reply Ex. 4 at FPL-002071.

[32] Compl. Ex. 1 at ATT00111 (JUA § 1.1.5).

fact, a 35-foot pole can accommodate AT&T and FPL and poles of this height are jointly used by the parties, as shown in the data FPL's contractor, Robert Murphy, provided.[33]

21. FPL's selection of pole height appears to be based on FPL's preferences, needs, and predictions about the highly competitive communications market. Indeed, FPL's facilities require even *more* space on a pole now than when FPL was allocated 6 feet of space on a 35- or 40-foot pole in the JUA.[34] In calculations for a proportional rate for use of AT&T's poles, FPL uses the 10.5-foot input for space occupied that results from the Commission's presumptions.[35] And as noted above, in some of its license agreements, FPL reserves [redacted]"[36] Mr. Kennedy also references FPL's storm hardening initiatives,[37] which provide another reason for the height of FPL's poles: they are designed to "limit the impact of storms on the *electric system*."[38] AT&T is not the reason for the height of FPL's poles.

22. FPL also states that it will replace a pole if necessary to provide additional capacity for AT&T's facilities, but the 35- and 40-foot poles specified in the JUA are tall enough that this is rarely necessary. In any event, FPL charges AT&T for the pole replacement in this scenario. Also, AT&T provides FPL the same reciprocal "benefit," meaning that if FPL requires additional space on an AT&T pole, AT&T will replace the pole to provide additional capacity for FPL. Mr. Kennedy also admits that FPL typically replaces its poles when needed to create

[33] *See* Answer Ex. E at FPL00174-217 (Murphy Decl., Ex. B).

[34] *See* Compl. Ex. 1 at ATT00112 (JUA § 1.1.7).

[35] *See* Answer Ex. D at FPL00157 (Deaton Decl. ¶ 11).

[36] *See, e.g.*, *See, e.g.*, Reply Ex. 3 at FPL-002803; Reply Ex. 4 at FPL-002071.

[37] *See* Answer Ex. A at FPL00004 (Kennedy Decl. ¶ 8).

[38] *See* Reply Ex. 6 at ATT01017 (FPL installs new poles to strengthen electric grid and help communities prepare for hurricane season) (emphasis added).

additional capacity for AT&T's competitors,[39] meaning that AT&T is comparable to its competitors. Indeed, FPL has every incentive to replace poles to create additional capacity, because FPL receives additional rental income and a [redacted] if it does.

23. Mr. Kennedy tries to confuse matters by inaccurately claiming that AT&T occupies 3.33 feet of safety space on a pole,[40] but the FCC has already rejected this argument, finding that the safety space is used by electric utilities and should not be charged to communications and cable attachers.[41] This makes sense because the safety space is regularly used for power company attachments, such as street lights, step-down distribution transformers, and grounded, shielded power conductors. In contrast, AT&T's facilities are not even usually adjacent to the safety space (as FPL's facilities always are). Many of FPL's license agreements, for example, [redacted].[42] It would defeat the principle of competitive neutrality to charge AT&T, but not its competitors, for safety space that AT&T's facilities do not touch and that neither AT&T nor its competitors can occupy.

24. FPL refers to the fact that AT&T's aerial facilities—like all aerial facilities—include some sag, which could be fifty feet or more from the pole.[43] It is not clear why FPL offers this observation, as even FPL does not attempt to charge AT&T for mid-span sag.[44] And

[39] Answer Ex. A at FPL00006 (Kennedy Decl. ¶ 10).

[40] *Id.* at FPL00016 (Kennedy Decl. ¶ 30).

[41] *See* Consolidated Partial Order, 16 FCC Rcd at 12130 (¶ 51) (stating that "the 40-inch safety space …. is usable and used by the electric utility").

[42] *See, e.g.*, Reply Ex. 3 at FPL-002820.

[43] *See* Answer Ex. F at FPL00267 (Davis Decl. ¶ 14); *see also* Answer Ex. E at FPL00169 (Murphy Decl. ¶¶ 15-16).

[44] *See* Answer Ex. A at FPL00016 (Kennedy Decl. ¶ 30); Answer Ex. E at FPL00169 (Murphy Decl. ¶ 16).

indeed, FPL cannot lawfully charge AT&T or AT&T's competitors for mid-span sag because the FCC's formulas charge *only* for "space occupied."

25. Mr. Kennedy also refers to the "girth of the AT&T cable," but offers no comparison to the "girth" of cables placed by AT&T's competitors.[45] AT&T's current network does not require materially greater space on average than the networks of AT&T's competitors. AT&T has devoted substantial resources in recent years to the deployment of thin, lightweight fiber cables. At the same time, the coaxial cables used by cable companies are increasingly being overlashed multiple times, which increases their bundle size, thickness, and weight. There is, therefore, no good reason (much less any evidence on which) to differentiate the "girth" of AT&T's cables from the "girth" of its competitors.

26. Indeed, FPL's quick check of 2,000 poles this past summer confirms that AT&T's cables are comparable in size to its competitors' cables. On those 2,000 poles, FPL's contractor took measurements that assigned AT&T a minimum of 12 inches of space on every pole, and then added any additional space occupied.[46] The field review was thus designed to ensure that AT&T would be assigned *at least* the same 12 inches of space that its competitors are presumed to occupy.[47] Yet, even using tools that can deviate from the actual measurement by up to 1 inch, FPL's contractor concluded that AT&T uses just 14.2 inches (1.18 feet) of space on the poles.[48]

27. FPL's limited review of the 2,000 poles was not designed to produce accurate and reliable results sufficient to calculate rental rates. Indeed, 2,000 poles reflect less than 0.5% of

[45] *See* Answer Ex. A at FPL00014 (Kennedy Decl. ¶ 25).

[46] *See* Answer Ex. E at FPL00169 (Murphy Decl. ¶ 15).

[47] *See* 47 C.F.R. § 1.1410.

[48] Answer Ex. E at FPL00169 (Murphy Decl. ¶¶ 14, 16).

the 425,704 FPL poles included in FPL's 2018 invoice.[49] The exercise did nonetheless corroborate my prior Affidavit, in which I explained that AT&T installs the same types of light-weight copper and fiber optic cables that its competitors install, and so should pay the same rate for its use of comparable space on FPL's poles.[50] Mr. Kennedy also effectively admitted that I was right in stating that AT&T does not want, need, or require the 4 feet of space allocated to AT&T under the JUA—and that FPL does *not* reserve 4 feet of space for AT&T's exclusive use as the JUA requires.[51] I find Mr. Kennedy's explanation illuminating: he explains that FPL *must* comply with federal law instead of the express language of the JUA term reserving 4 feet of space for AT&T because FPL must comply with a relevant FCC *Order*.[52] This is exactly the point that AT&T made through the parties' negotiations with respect to the "just and reasonable" rate requirement of federal law and the Commission's 2011 and 2018 *Orders*. FPL is plainly picking and choosing the FCC orders with which it will comply depending on whether it suits FPL's financial interests.

28. Instead, FPL insisted that it can forever collect far higher rental rates from AT&T than it collects from AT&T's competitors, threatened to remove AT&T from FPL's poles, and terminated "the further granting of joint use of poles" under Article XVI.[53] FPL has thus significantly increased costs for AT&T and negatively impacted its deployment going forward because FPL has not offered any new agreement for AT&T's use of new FPL pole lines. This

[49] *See* Compl. Ex. 2 at ATT00147.

[50] *See* Compl. Ex. C at ATT00069 (Peters Aff. ¶ 11).

[51] *See id.*; *see also* Answer Ex. A at FPL00007 (Kennedy Decl. ¶ 11).

[52] Answer Ex. A at FPL00007 (Kennedy Decl. ¶ 11).

[53] Compl. Ex. 1 at ATT00128 (JUA, Art. XVI); Compl. Ex. 23 at ATT00250 (Notice of Termination).

means that, where AT&T would have previously been able to deploy on a new FPL pole line, AT&T will instead need to identify, obtain permission to use, and incur the cost to deploy alternate infrastructure (assuming local authorities permit duplicative infrastructure) in order to reach its customers. And, the fact that FPL continues to try to remove AT&T's facilities from its existing poles puts the lie to FPL's claim that any rate lower than the JUA rate would make its investment in joint use poles "worthless,"[54] as FPL is apparently willing to forego *all* future rental income from AT&T to try to gain an advantage in this litigation.

29. Another flaw throughout FPL's filing is its suggestion that, from the outset, joint use was an option for AT&T because AT&T could have instead built its own network. This is another fiction—commonly advanced by electric companies to avoid reducing rental rates to comply with the law. The fact is that a single pole line was created in large part because municipalities and property owners wanted efficiency in the use of their rights-of-way and wanted to avoid communities having a forest of utility poles. That remains true today, as is readily apparent from the accelerated adoption of municipal ordinances regulating use of the public rights-of-way by communications attachers. State regulators, homeowners and local authorities do not want two pole leads on one street if they can be avoided. Setting the aesthetic issues aside, it is inconceivable that state regulators over the past century would have considered it prudent for two rate-of-return regulated utilities sharing common ratepayers to build two duplicative pole lines instead of a single shared network.

30. FPL also takes issue with AT&T's operations in ways that are wholly unfounded. For example, Mr. Kennedy speculates that AT&T may be able to attach to a pole faster than its competitors can, because its competitors may need to wait for AT&T to complete make-ready

[54] *See, e.g.*, FPL Br. at 29.

before they can attach. But AT&T needs to perform the same engineering and preparatory work as its competitors before attaching, AT&T manages the work through the same National Joint Utility Notification System (NJUNS) application that its competitors use, and can also experience delays if it needs to wait for its competitors to complete make-ready before AT&T can attach.

31. Mr. Kennedy says that AT&T is advantaged because it can attach to FPL's common grounding pole bond when it makes an attachment to FPL's pole.[55] But Mr. Kennedy admits that AT&T's competitors may also use FPL's common grounding pole bond.[56] That must be true because each attacher on a pole must attach to the same ground bond for safety purposes.

32. Mr. Kennedy says that he is not aware of AT&T performing post-installation inspections of AT&T's facilities.[57] But AT&T's workforce has extensive training related to safety and the installation and maintenance of aerial facilities, and its construction managers are required to perform random inspections of installation and make-ready work performed by technicians. Thus, regardless of Mr. Kennedy's subjective experience, AT&T does inspect its facilities post-installation to ensure they meet safety standards.

33. Mr. Kennedy also says that he cannot recall any time that AT&T replaced a joint use pole because AT&T's facilities suffered damage due to their location, which generally is the lowest on the pole.[58] But AT&T's aerial facilities are often damaged due to their location without requiring a pole replacement. For example, AT&T has had its cables pulled down by

[55] Answer Ex. A at FPL00014 (Kennedy Decl. ¶ 23).

[56] *Id.*

[57] *See, e.g.*, *id.* at FPL00010 (Kennedy Decl. ¶ 15).

[58] *Id.* at FPL00013-14 (Kennedy Decl. ¶ 20.)

large vehicles (a dump truck, fork lift, tractor trailer, moving truck) without impacting the pole or any other attacher on it. In some cases, the pole is also broken or pulled down with the cable.

34. Mr. Kennedy questions why AT&T has not asked to place its facilities at a different location on the poles in an effort to avoid these added costs.[57] But he then provides the answer, stating that AT&T's location is the result of "[s]tandard practice and code compliance."[58] AT&T generally must remain the lowest attacher on the pole so that various communications facilities do not crisscross mid-span. This operates to the benefit of all attachers on a pole by eliminating confusion and is not a reason to charge AT&T a higher rental rate.

35. For all of these reasons and those expressed in my prior Affidavit, it remains my opinion that FPL has not identified any net benefit that gives AT&T a material advantage over its cable and CLEC competitors that could justify AT&T's payment of a higher rental rate for use of FPL's poles.

Mark Peters

Sworn to before me on
this 6th day of November, 2019

Notary Public

AMY MICHELLE MONSON
Notary Public, State of Texas
Comm. Expires 07-11-2020
Notary ID 864540

[57] *Id.*

[58] *Id.*

Exhibit D

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T FLORIDA, Complainant, v. FLORIDA POWER AND LIGHT COMPANY, Defendant.	Proceeding No. 19-187 Bureau ID No. EB-19-MD-006

REPLY AFFIDAVIT OF CHRISTIAN M. DIPPON, PH.D.
IN SUPPORT OF POLE ATTACHMENT COMPLAINT

CITY OF WASHINGTON)
) ss.
DISTRICT OF COLUMBIA)

I, Christian M. Dippon, Ph.D., being sworn, depose and say:

1. My name is Christian M. Dippon. My business address is 1255 23rd Street, Suite 600, Washington, DC 20037. I am a Managing Director at the Washington, DC, office of NERA Economic Consulting (NERA) where I also serve as Chair of the Global Energy, Environment, Communications & Infrastructure (EECI) practice. I submitted an initial affidavit in this matter that includes my qualifications at Exhibit D-1.[1]

[1] See Affidavit of Christian M. Dippon, Ph.D. in Support of Pole Attachment Complaint, *BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Florida Power and Light Company*, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006, dated June 28, 2019 (hereinafter Dippon Initial Aff.).

2. I prepared this Reply Affidavit at the request of counsel for Complainant BellSouth Telecommunications, LLC d/b/a AT&T Florida (AT&T). Counsel requested that I review the Answer, Brief in Support of Answer, and supporting declarations dated September 16, 2019 and filed by Florida Power and Light Company (FPL), and respond to FPL's arguments.[2] This Reply Affidavit focuses primarily on FPL's Brief in Support of Answer and the declarations of Thomas J. Kennedy (FPL) and William Zarakas (The Brattle Group).[3]

3. My review of FPL's filings confirms and reinforces the conclusions I reached in my initial affidavit: the pole attachment rates that FPL has been charging AT&T under the parties' 1975 Joint Use Agreement (JUA), as amended in 2007, are not just, reasonable, or competitively neutral but reflect FPL's longstanding and ongoing abuse of its position as owner of a large and annually increasing majority of the utility poles jointly used by the parties. I continue to recommend that the Federal Communications Commission (FCC) set the just and reasonable rate for AT&T's use of FPL's poles at the properly calculated per pole new telecom rate because FPL has not identified anything that individually or collectively provides AT&T a net material competitive benefit that warrants a deviation from the applicable FCC new telecom rate standard.

---

[2] See Respondent Florida Power & Light Company's Answer and Brief in Support of its Answer to the Amended Complaint of BellSouth Telecommunications, LLC, D/B/A AT&T Florida, *BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Florida Power and Light Company*, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006, dated September 16, 2019 (hereinafter FPL Brief).

[3] See FPL Answer, Ex. A, Declaration of Thomas J. Kennedy, *BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Florida Power and Light Company*, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006, dated September 13, 2019 (hereinafter Kennedy Decl.); FPL Answer, Ex. B, Declaration of William Zarakas, *BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Florida Power and Light Company*, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006, dated September 11, 2019 (hereinafter Zarakas Decl.).

4. As support for my conclusions, I explain that FPL advocates a rate structure that the FCC has been trying to eliminate and rate formula inputs that the FCC has found unlawful. I also detail why FPL's attempted defense of the JUA rates—specifically, that replicating FPL's pole network or installing AT&T's plant underground would be more expensive—is evidence of FPL's continued exercise of market power and is at odds with the objectives of two recent FCC orders that mandate just, reasonable, and competitively neutral rates. I also respond to the alleged benefits presented by Mr. Kennedy and explain why they do not establish that AT&T has a net material advantage over its competitors. In addition, I refute Mr. Zarakas' claim that an alleged FPL offer to buy AT&T's poles indicates a preference for the JUA by AT&T as compared to the terms and conditions of a license agreement.

5. As before, AT&T retained me as an independent expert in this matter. As such, neither my compensation nor my firm's compensation is dependent in any way on the substance of my opinions or the outcome of this matter. I may revise and supplement my opinions upon further review and analysis of any new data, materials, analysis, or pleadings.

I. FPL ADVOCATES THE RATE STRUCTURE THAT THE FCC HAS BEEN TRYING TO ELIMINATE

6. As explained in my initial affidavit, the present dispute is about what constitutes a just and reasonable pole attachment rate for AT&T's use of FPL's poles that is competitively neutral. I highlighted that two FCC orders "offer specific guidance on this topic."[4] These orders—specifically, the 2011 *Pole Attachment Order* and the 2018 *Third Report and Order*[5]—

[4] Dippon Initial Aff., ¶ 15.

[5] See *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) (hereinafter *Pole Attachment Order*); see also *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-

make it clear that FPL must charge AT&T the same annual pole attachment rate that applies to competitive local exchange carriers (CLECs) and cable companies providing telecommunications services (CATVs) under the FCC's new telecom formula ($13.32 per pole for the 2017 rental year),[6] *unless* FPL can demonstrate with clear and convincing evidence that the JUA provides AT&T a net material competitive advantage over its CATV and CLEC rivals.[7] However, FPL may not charge AT&T more than $20.18 per pole (for the 2017 rental year), which is the rate that results from a proper application of the FCC's pre-existing telecom formula.[8] The FCC's guidance significantly simplifies the present matter because (using the 2017 rental year as an example) it establishes that $13.32 per pole is the rate that FPL may lawfully charge AT&T, requires FPL to demonstrate with clear and convincing evidence that it may lawfully charge a higher rate, and, in such an event, sets a $20.18 per pole upper bound on the range of potential just and reasonable rates.[9] In contrast, FPL charges AT&T (using the 2017 rental year as an example) [redacted] per wood distribution pole, [redacted] per concrete distribution pole, and [redacted] per transmission pole.[10]

79, WC Docket No. 17-84, Third Report and Order and Declaratory Ruling, 14 FCC Rcd 18049 (2018) (hereinafter *Third Report and Order*).

[6] See Affidavit of D. Rhinehart in Support of Pole Attachment Complaint, *BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Florida Power and Light Company*, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006, June 27, 2019 (hereinafter Rhinehart Aff.). I use the 2017 rental year as the example year in this Reply Affidavit because it is the rental year for which I detailed FPL's rates in my Initial Affidavit. See Dippon Initial Aff., ¶¶ 11-13. The points I make apply also to rates FPL charged during the relevant rental years before and after the exemplar 2017 rental year.

[7] See *Pole Attachment Order*, ¶¶ 217–218; *Third Report and Order*, ¶ 123-129.

[8] Rhinehart Aff., ¶¶ 24–25.

[9] *Third Report and Order*, ¶¶ 123-129; 47 C.F.R. § 1.1413(b).

[10] FPL's Resp. to AT&T's Interrog. No. 5; see also Dippon Initial Aff., ¶¶ 11-13.

7. FPL's filings essentially ignore the FCC's guidelines and instead pursue a mix of theories—none of which is economically sound or consistent with the FCC's conclusions on issues it has already considered and ruled upon. Moreover, FPL unnecessarily complicates the matter by presenting a defense of the JUA rates that depends entirely on a departure from settled ratemaking and competitive neutrality principles. FPL's effort to confuse should not be mistaken for the clear and convincing evidence required to justify a departure from the new telecom rate.

A. FPL Relies On Inconsistent And Irrelevant Theories In Its Failed Effort To Justify The JUA Rates

8. FPL's filings reflect an effort to preserve the current rental rates by presenting any conceivable argument regardless of whether it makes sense, is consistent with other arguments or theories, or is grounded in fact. Five main theories appear throughout its filings; not one justifies the JUA rates or any upward departure from a properly calculated new telecom rate.

9. As its first theory, FPL argues that the JUA allowed AT&T to attach to FPL's poles, something FPL thinks provides AT&T value that is comparable to the exceptionally high rates Mr. Kennedy erroneously describes as "market rates."[11] But simply attaching to FPL's poles does not distinguish AT&T from its competitors because they also attach to FPL's poles. And FPL does not charge these so-called "market rates" to AT&T's competitors because they, like AT&T, are entitled to a "just and reasonable" rate under federal law.[12] These so-called "market rates," therefore, cannot shed light on what a "just and reasonable" and competitively neutral rate is for AT&T.

[11] Kennedy Decl., ¶ 7.

[12] *Ibid*; FPL's Resp. to AT&T's Interrog. No. 5.

10. As its second theory, FPL claims that the JUA rates are reasonable because they are generally lower than the rates AT&T would pay under the pre-existing telecom formula (also referred to by FPL as the old telecom formula).[13] A closer inspection of this argument reveals that it is baseless, as it relies on the wrong rate formula, ignores two out of three of the JUA rates, and misapplies the FCC's pole attachment rate formula. FPL's theory ignores the fact that FPL charged AT&T's competitors a $14.84 per pole rate using the new telecom formula (using the 2017 rental year as an example),[14] which translates into a pre-existing telecom rate of $22.48 per pole.[15] But FPL manipulated the inputs to the pre-existing telecom formula to produce a rate of [redacted] per pole for AT&T, which is more than [redacted] per pole higher than this $22.48 per pole rate.[16] Furthermore, under the JUA FPL still charges AT&T rates for concrete distribution poles and transmission poles that far exceed even FPL's inflated [redacted] per pole pre-existing telecom rate for AT&T's use of its wood and concrete distribution poles.[17]

11. As its third theory, FPL argues that AT&T somehow revealed a preference for the JUA rates because AT&T did not "follow up on FPL's idea" to purchase AT&T's "poles and in return, have FPL negotiate with AT&T [new] rates, terms and conditions" for pole access.[18] FPL

[13] See FPL Brief, p. 4.

[14] Reply Ex. 5; FPL Resp. to AT&T's Interrog. No. 5. This rate is inflated because the new telecom rate for use of FPL's poles, using the Commission's presumptive inputs, was $13.32 per pole for the 2017 rental year. See Rhinehart Aff., ¶ 14.

[15] The pre-existing telecom rate is equal to the new telecom rate divided by 0.66.

[16] FPL Answer, Ex. D, Declaration of Renae B. Deaton, *BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Florida Power and Light Company*, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006, dated September 14, 2019 (hereinafter Deaton Decl.), ¶ 9.

[17] FPL's Resp. to AT&T's Interrog. No. 5.

[18] Kennedy Decl., ¶ 36.

provides no proof that FPL ever extended an offer to purchase the poles,[19] ever suggested an offer price for the poles, or ever promised that AT&T would have access to FPL's poles under the same rates, terms, and conditions that apply to its competitors if AT&T followed up on FPL's idea, requested an offer, and eventually sold FPL the poles.[20] More important, FPL does not explain why a sale of AT&T's poles could be a prerequisite for AT&T to obtain access to FPL's poles at the just and reasonable rate required by federal law. FPL's theory is not just factually unsupported, but irrelevant.

12. As its fourth theory, FPL speculates that AT&T must have found the JUA rates reasonable or else AT&T would have opted to build its own poles or install cables in trenches or ducts.[21] This theory is counterintuitive as regulation of pole attachment rates is intended to *avoid* the "unnecessary and costly duplication of plant for all pole users."[22]

13. As its fifth theory, FPL proclaims that AT&T's JUA rates are reasonable because the JUA produces significant "benefits" to AT&T, many based solely on a comparison to a hypothetical world in which there is no sharing of FPL's poles at all. FPL, for example, argues that AT&T "avoided" make-ready costs (valued using a [redacted] per pole current-day estimate) because FPL claims that it installed poles 10 feet taller than a "pole FPL needs to solely serve its

[19] Indeed, AT&T explains that FPL's "idea" remained an "idea" because FPL never followed up with an offer to purchase AT&T's poles. See Reply Affidavit of Mark Peters in Support of Pole Attachment Complaint, *BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Florida Power and Light Company*, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006, Nov. 6, 2019 (hereinafter Peters Reply Aff.), ¶ 8.

[20] See Kennedy Decl., ¶ 36 (AT&T "stated they would be willing to consider the offer if it placed them on a level playing field with other telecom providers," but "FPL noted that all these things could be considered and addressed" later).

[21] See ibid, ¶ 7.

[22] See *Pole Attachment Order*, ¶ 4.

electric customers"[23] and that AT&T "avoided" pole replacement costs (valued using a [redacted] per pole current day estimate) because AT&T did not have to replace FPL's hypothetical shorter poles "with a wood pole that could accommodate communication space."[24] Other alleged "benefits" relate solely to activities that involved, at most, a one-time difference *at the time an attachment was deployed*. For example, FPL alleges that AT&T does not have to pay permitting fees to attach to FPL's poles (valued by FPL at [redacted] per pole, though FPL charges a lower [redacted] per pole permitting fee for some poles)[25] and that AT&T does not have to subcontract this "permit preparation work" (valued at [redacted] per pole based on FPL's unsubstantiated claim that "one contractor" charges this amount).[26] Setting aside the fact the permitting fees cover costs that FPL does not incur on AT&T's behalf because AT&T performs the work itself,[27] these "benefits" cannot justify a departure from the new telecom rate because FPL terminated AT&T's right to make attachments to new pole lines.[28] Thus no permits can be needed for new pole lines to which AT&T cannot attach.

14. FPL also does not attempt to "attribute a specific dollar value" to many of its alleged "benefits."[29] When it does, it fails to account for its own role in imposing additional costs on AT&T that FPL does not also impose on its CATV and CLEC attachers. For example, FPL alleges that AT&T enjoys "benefits" because of the JUA's billing cycle, but that billing cycle

[23] See FPL Brief, p. 51; Kennedy Decl., ¶¶ 9-10.

[24] Kennedy Decl., ¶ 10.

[25] FPL Brief, p. 56; Kennedy Decl., ¶ 15.

[26] FPL Brief, p. 56.

[27] See Peters Reply Aff., ¶ 15.

[28] See Dippon Initial Aff., ¶ 14.

[29] Kennedy Decl., pp. 12-14.

also applies to FPL's payment of rent to AT&T. These reciprocal costs must be considered when determining whether FPL provided clear and convincing evidence that AT&T receives net material benefits under the terminated JUA.[30]

15. Ultimately, FPL simply claims that the JUA rates are just and reasonable. It does not explain whether it believes its valuations should be additive, and of course they cannot be, as many are internally inconsistent. FPL simply alleges dollar figures that exceed the [redacted], [redacted], and [redacted] per pole rates it charged AT&T (using the 2017 rental year as an example).[31] Furthermore, FPL's exercise quantifying the alleged benefits is based solely on its own word. FPL provided no support and attached no invoices or payment records to its filing. Not surprisingly, the exercise ends with a result that incorrectly implies that AT&T has enjoyed "advantages" in amounts that are many multiples of FPL's total annual cost of installing and maintaining a joint use pole, which FPL calculated as [redacted] (using the 2017 rental year as an example).[32]

B. FPL Wants to Retain the Status Quo and Ignore All ILEC Rate Reforms Issued by the FCC Since 2011

16. The only commonality in FPL's flawed and internally inconsistent theories is their ability to produce rental rates that exceed the [redacted] per pole rate that FPL charged AT&T for use of wood distribution poles (using the 2017 rental year as an example). Per FPL's reasoning, this is sufficient to establish that the [redacted] per pole rate is just, reasonable, and competitively neutral. There are at least four fundamental errors in FPL's argumentation.

---

[30] See Dippon Initial Aff., ¶ 36.

[31] See, e.g., Kennedy Decl., Ex. J; see also FPL's Resp. to AT&T's Interrog. No. 5; Dippon Initial Aff., ¶¶ 11-13.

[32] Reply Ex. 5.

17. First, FPL tries to focus only on the lowest of the exceptionally high JUA rates, ignoring that it *also* charged AT&T [redacted] per pole rate for use of concrete distribution poles and a [redacted] per pole rate for use of transmission poles (using the 2017 rental year as an example). This omission eliminates many of FPL's arguments. For example, FPL argues that its manipulated pre-existing telecom rates ([redacted] per pole for the 2017 rental year) "are indeed higher than the 1975 JUA rates."[33] But a [redacted] per pole rate is certainly *not* higher than the [redacted] concrete distribution pole and [redacted] transmission pole rates FPL charged AT&T that year.

18. Second, FPL's theories fail to replicate any of the rates FPL charges AT&T. Under its first theory, FPL declares as "market rates" the [redacted] per pole rate (using the 2017 rental year as an example) that resulted from its alleged negotiations with three attachers that do not have federal rate protection.[34] Under its second theory, FPL claims that the pre-existing telecom formula can produce a [redacted] per pole rate for the 2017 rental year. FPL's third and fourth theories rely on no rental rate and simply claim that the JUA rates must be reasonable because AT&T did not follow up on FPL's pole purchase idea (which did not guarantee access or new telecom rates post-sale) and because AT&T allegedly "decided" decades ago not to deploy a duplicative network. Under FPL's fifth theory, FPL claims AT&T has "saved" [redacted] of dollars per pole because FPL shares its poles with other entities, including AT&T and its competitors.

19. The JUA rates are not based on any of these theories. Rather, FPL's arguments are afterthoughts developed to make its excessive JUA rates appear less discriminatory.

[33] Answer ¶ 22.

[34] FPL Brief, p. 49; Kennedy Decl., ¶ 7; FPL's Resp. to AT&T's Interrog. No. 5.

However, none of this can establish that the JUA rates FPL charges AT&T are just, reasonable, and competitively neutral as required by law. The [redacted], [redacted], and [redacted] per pole rates FPL charged AT&T, using the 2017 rental year as an example, still far exceed the $26.12 per pole rate that, in part, led the Commission to adopt the new telecom rate presumption in order to accelerate rate relief to ILECs.[35]

20. Third, FPL does not advocate for a single rate that falls within the range of properly calculated new and pre-existing telecom rates set by the FCC.[36] This range would set attachment rates between $13.32 per pole and $20.18 per pole for the 2017 rental years.[37] Yet, FPL argues for [redacted] per pole JUA rates, so-called "market rates" that exceed [redacted] per pole, or even higher rates reflecting the alleged value of alleged "benefits" amounting to [redacted] of dollars per pole. Even when FPL calculates *new* telecom rates for AT&T's use of FPL's poles, it manipulates the rate formula to produce a rate of [redacted] per pole for the 2017 rental year—which is *higher* than the properly calculated $20.18 per pole *pre-existing* telecom rate that year.[38]

21. Fourth, FPL disclosed in response to AT&T's interrogatories that it charged new telecom rates that are far lower than the new telecom rates it claims should be calculated here.[39] These rates that FPL in fact charged are absent from FPL's filing. But they confirm that the rates FPL charges AT&T—as well as the rates it calculates under its various unfounded theories—are

[35] See *Third Report and Order*, ¶ 125.

[36] As calculated by Mr. Rhinehart, the new and pre-existing telecom rates for AT&T's use of FPL's poles were $13.32 per pole and $20.18 per pole, respectively, for the 2017 rental year. See Rhinehart Aff., ¶¶ 14, 23.

[37] Rhinehart Aff., Ex. R-4.

[38] Deaton Decl., ¶ 8.

[39] FPL's Resp. to AT&T's Interrog. No. 5; Deaton Decl., ¶ 8.

not competitively neutral. FPL charged a new telecom rate of $14.84 per pole and a cable rate of $14.88 per pole for the 2017 rental year.[40] Each is significantly lower than the [redacted] and [redacted] per pole JUA rates AT&T paid for the 2017 rental year, as well as the rate FPL derived under each of its various unfounded theories.[41]

22. FPL's reliance on its mix of theories indicates that FPL seeks to retain the status quo. Indeed, it regularly refers to the fact that it has charged rates under the JUA for 45 years. It is unclear how this establishes that the rates are just and reasonable. FPL also does not explain how keeping the status quo is consistent with the significant regulatory guidance provided by the FCC since 2011. The Commission has rightly recognized that excessive rates, like those charged by FPL, discourage network rollouts, network upgrades, and other critical investments as well as provide a competitive advantage to CLEC and CATV providers while overcompensating the power companies.

C. FPL's Pre-Existing Telecom Rate Theory Is Based On Incorrect Calculations

23. As noted above, FPL tries to justify the JUA rates by arguing that "[t]he properly calculated old telecom rates [were] higher in every instance than the 1975 JUA rates…."[42] There are several problems with FPL's argumentation.

24. First, FPL's claim is not true. FPL compares its miscalculated pre-existing telecom rates to the base contract rate that applies to wood distribution poles, to assert that (for the 2017 rental year), its [redacted] per pole miscalculated pre-existing telecom rate exceeds the [redacted] per pole wood distribution pole rate. But FPL charged AT&T [redacted] per pole rate for use of concrete distribution poles and [redacted] per pole rate for use of transmission poles that same

[40] FPL's Resp. to AT&T's Interrog. No. 5.

[41] Ibid

[42] FPL Brief, p. 14.

year, rates that are far higher than the [redacted] per pole rate FPL miscalculates for wood and concrete distribution poles.

25. Second, the FCC expressly held that the presumptive rate for an ILEC is a properly calculated new telecom rate, with the pre-existing telecom rate only relevant if FPL demonstrates with clear and convincing evidence that the JUA provides AT&T net material benefits that advantage AT&T over its competitors.[43] FPL has not met this standard, so the pre-existing telecom rate is not relevant.

26. Third, FPL significantly inflates the rates that result from the pre-existing telecom formula so that they cover [redacted] percent of FPL's net bare pole cost (as calculated by FPL)[44] instead of the 11.2 percent of FPL's net bare pole cost that the pre-existing telecom formula should cover.[45] The extent of FPL's inflations are also apparent when considering the $14.84 per pole new telecom rental rate that FPL charged AT&T's competitors for the 2017 rental year.[46] As noted previously, the pre-existing telecom rate is about 1.5 times a new telecom rate,[47] so FPL's $14.84 per pole new telecom rate translates to a pre-existing telecom rate of, at most, $22.48 per pole. FPL instead claims that, when charging AT&T, the pre-existing telecom rate should be more than [redacted] higher per pole ([redacted] per pole for the 2017 rental year).[48]

[43] *Third Report and Order*, ¶ 129.

[44] Reply Ex. 5.

[45] *Pole Attachment Order*, ¶ 131, fn. 399.

[46] Reply Ex. 5; FPL's Resp. to AT&T's Interrog. No. 5.

[47] The pre-existing telecom rate is equal to the new telecom rate divided by 0.66 because FPL used the Commission's presumptive inputs when calculating the new telecom rates it charged AT&T's competitors. This is the same as multiplying the new telecom rate by about 1.5.

[48] Deaton Decl., ¶ 9.

27. FPL inflated its calculation of a pre-existing telecom rate for AT&T in ways that are contrary to Commission precedent.[49] For example, FPL assigns AT&T 3.33 feet (or 40 inches) of "safety space" on the pole although it admits that it cannot lawfully charge AT&T's competitors for that space.[50] Specifically, the FCC found that because the safety "space is usable and used by the electric utility, we reject arguments to reduce the presumptive usable space of 13.5 feet by 40 inches."[51] That does not change when AT&T is attached to the pole.[52] Indeed, AT&T's attachments are often not located next to the safety space.[53] The safety space is located between FPL's lowest attachment and the highest communications attachment, which is often the attachment of a CLEC or CATV attacher not AT&T.[54]

28. FPL also significantly inflates its pre-existing telecom rates by relying on an incorrect average number of attaching entities. It claims that an average of 2.99 attaching entities should be used instead of the presumption that there are 5 attaching entities, [redacted].[55] FPL reportedly arrived at this number by mixing the results of undisclosed audits of "regulated attaching entities," which it performed over many years, with a field review of fewer than 2,000 poles that it commissioned for this litigation.[56]

---

[49] FPL's calculation of new telecom rates for AT&T are inflated for these same reasons.

[50] FPL Brief, p. 70, fn. 278.

[51] *Amendment of Commission's Rules and Policies Governing Pole Attachments*, CS Docket Nos. 97-98 and 97-151, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12141, ¶ 51 (2001) (hereinafter *Consolidated Partial Order*).

[52] Ibid

[53] See Peters Reply Aff., ¶ 23.

[54] Ibid

[55] See Deaton Decl., ¶ 8; Reply Ex. 5.

[56] Kennedy Decl., ¶ 30.

29. FPL conducted this review because FPL agrees that it did not have data to rebut the average number of attaching entities presumption or space occupied presumption when this lawsuit was filed.[57] In the undisclosed surveys, FPL reports that it *only* surveyed the number of *regulated* attached entities, which it describes as "Power, ILEC, CATV, and Telecommunications Carrier."[58] This description clearly does *not* include governmental and private attachers; it should include wireless attachers, but it is impossible to tell whether wireless attachers were included because FPL did not provide any information to confirm.

30. Because FPL agrees that this data is insufficient to determine the average number of attaching entities, it sought to create data to do so.[59] It did not, however, collect the average number of attaching entities even on the poles that it reviewed. Instead, it looked for governmental attachers on those poles, and then tried to bootstrap that information to previously collected data about different poles at different times. This cannot produce a value for the average number of attaching entities *before* the data was collected, and so cannot be used—as FPL does—to try to inflate rates back to 2014. It also does not yield a sound estimate of the average number of attaching entities now and going forward. It remains unclear whether wireless attachers have been counted; private attachers have not been counted; and the exercise relies on older data about the number of attachers in a state that FPL describes as "fast growing."[60] FPL's

[57] FPL Answer, Ex. F, Declaration of Ronald J. Davis, *BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Florida Power and Light Company*, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006, dated September 13, 2019, ¶ 4.

[58] Kennedy Decl., ¶ 28.

[59] Ibid

[60] See ibid, ¶ 9.

contractor identified some problems with the data from the passage of time,[61] and the number of attaching entities is the type of data that is likely to increase over time in a fast-growing state. There is also no way to verify FPL's representations absent a follow-on field review identical to the one FPL's contractor performed, as FPL only provided AT&T a list of poles and photographs of poles that are not identified by location and that are often obscured by surrounding vegetation.

31. Given the many shortfalls of FPL's attempted quick-fix, and because [redacted], properly calculated new telecom and pre-existing telecom rates should be calculated using the Commission's presumptive inputs. The properly calculated new and pre-existing telecom rates (using the 2017 rental year as an example) are $13.32 per pole and $20.18 per pole, respectively.

32. The rates would be lower if calculated using the 40.4-foot average pole height that FPL says resulted from its undisclosed annual surveys instead of the Commission's presumptive 37.5-foot pole height. That FPL has had this pole height information, [redacted], suggests that FPL either does not find its prior data sufficiently reliable to calculate rental rates—or that it seeks only to create or use data where it will increase rental rates and FPL's bottom line. AT&T has appropriately relied on the Commission's presumptive inputs.

D. FPL Failed To Rebut the New Telecom Rate Presumption With Its Allegations of "Advantages" From the JUA

33. FPL claims it rebutted the presumption that AT&T should be charged a new telecom rate with "nearly twenty material net benefits and advantages AT&T receives under the

[61] See FPL Answer, Ex. E, Declaration of Robert Murphy, *BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Florida Power and Light Company*, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006, dated September 13, 2019, ¶ 12.

1975 JUA," having rounded up from eighteen.[62] I disagree. FPL relies almost exclusively on a convoluted and repetitive list of alleged benefits provided by Mr. Kennedy.[63] An examination of this list reveals that many of the alleged benefits are not competitive benefits but rather Mr. Kennedy's opinion that the JUA rates are better than AT&T's alternatives. This, however, is irrelevant to the principle of competitive neutrality that FPL needed to address. Others are duplicative. Many are hypothetical. Not one is supported by an executed license agreement, payment record, or actual data showing some cost that FPL actually incurs for both AT&T and its competitors for which FPL is not compensated.

34. FPL first claims that it need only "show[ ] that their monetary value more than justifies the 1975 JUA rates."[64] This is not the relevant question. Whether it is less expensive to attach to FPL's poles than it would be to pursue another deployment option is beside the point because AT&T's competitors also attach to FPL's poles. Yet this irrelevant "benefit of the bargain" theory runs through several of FPL's alleged benefits.

35. For example, FPL argues that AT&T could have been charged even higher rates. But AT&T's competitors are guaranteed a properly calculated new telecom rate, meaning that any other rates are irrelevant. FPL first points to so-called "market rates," which it says are a value less than it would cost to pursue some other deployment option, such as "building its own pole line [or] undergrounding its facilities," but may be equivalent to rates it charged three entities that are not entitled to just and reasonable rates.[65] It is a misnomer to refer to these rates as "market rates." FPL has market power because it controls access to poles, which are essential

[62] FPL Brief, pp. 4, 48-60.

[63] FPL also points to the declaration of William Zarakas, which I address below.

[64] FPL Brief, p. 4.

[65] Kennedy Decl., ¶ 7; FPL's Resp. to AT&T's Interrog. No. 5.

facilities. Thus, the rates it imposed on three entities without federal rate protection do not reflect the outcome of properly working market forces. And their existence cannot rebut the presumption that the new telecom rate, and not some "market rate," is the just and reasonable rate.

36. Relatedly, Mr. Kennedy points to wood distribution pole rates it charged other ILECs and claims that these rates show that AT&T was somehow advantaged by a better "bargaining position" than these other ILECs had.[66] But whether FPL could have imposed an even higher wood distribution pole rate on AT&T at a time when ILECs did not have federal rate protection is irrelevant. ILECs are now entitled to a properly calculated new telecom rate for their use of FPL's poles. FPL's claim that AT&T was "advantaged" over other ILECs is also wrong because AT&T has paid a [redacted] rate than other ILECs for use of FPL's concrete distribution poles.[67] FPL's claim that "AT&T's bargaining position with FPL, as informed in part by pole ownership ratios, has essentially remained strong since 1975,"[68] is rebutted by Mr. Kennedy's own data showing that AT&T's share of the joint use poles has decreased over the years, such that FPL now owns two joint use poles for every pole owned by AT&T.[69] Mr. Kennedy also explains that the decline in AT&T's pole ownership was "primarily due to FPL's FPSC-ordered storm hardening initiatives, which were required to be implemented after the devastating 2004 and 2005 hurricane seasons."[70] Yet in direct contradiction to this statement,

[66] Kennedy Decl., ¶ 8.

[67] FPL's Resp. to AT&T's Interrog. No. 5.

[68] Ibid

[69] Ibid, Exhibit A, FPL-ATT Joint Use Pole Ownership. Mr. Kennedy understates the disparity in his exhibit, as evident from a comparison to FPL's rental invoices. Complaint Ex. 2.

[70] Kennedy Decl., ¶ 8.

FPL argues without any factual support that "AT&T simply chose not to act to achieve its contractual [pole ownership] objective."[71]

37. FPL also claims that the JUA rates are less expensive than building a full pole network.[72] But AT&T's competitors did not need to build a pole network. CLECs and cable providers typically do not incur capital expenditures for poles, and given their statutory right of access, certainly do not need to do so in order to attach to FPL's poles. This argument is thus irrelevant. Similarly, FPL's claim that AT&T *can* access FPL's poles is not a competitive advantage. In FPL's view, but for "FPL's voluntary grant of access to its infrastructure" to AT&T, it would have no right to use FPL's poles.[73] But this is a material *disadvantage* for AT&T because AT&T's competitors have a statutory right of access to FPL's poles, *existing and new*, at all times.[74] Indeed, FPL's claim that the JUA *may* someday provide "value" to AT&T because AT&T *may* be able to sublet some space on FPL's poles to its wireless affiliate,[75] fails for at least this reason: AT&T's wireless affiliate has a statutory right to attach to FPL's poles at a properly calculated new telecom rate.[76] There is no reason for it to attach under the JUA's inflated rates.

38. FPL relies on other benefits that also reflect solely the difference between a world with shared use of infrastructure and a world without. This also is not the relevant question for

---

[71] FPL Brief, p. 9.

[72] Kennedy Decl., ¶ 9.

[73] FPL Brief, p. 4.

[74] 47 U.S.C. §224(f).

[75] Kennedy Decl., ¶ 11.

[76] Mr. Kennedy's valuation is a pure guess with respect to this allegation. He says he is "unaware of what 5G carriers budget/pay for access," but then he assigns a random value of "[redacted] per monopole." Ibid

purposes of competitive neutrality. Yet FPL argues that AT&T "avoided" make-ready costs and "avoided" replacing poles because FPL installed poles that were taller than FPL needed to provide electric service. This claim runs throughout FPL's list of alleged benefits, creating a misimpression that AT&T does not, in fact, pay FPL make-ready and pole replacement costs. But Mr. Kennedy ultimately admits that AT&T *does* pay "direct construction costs plus overheads that are required" for such work.[77] The whole pole height discussion is thus an exercise in make-believe.

39. The data contradicts Mr. Kennedy's claim that, were there no joint use with any communications companies, FPL would have installed poles 10 feet shorter and would have required AT&T to pay [redacted] to replace every FPL pole the first time AT&T wanted to attach.[78] Simultaneously, Mr. Kennedy argues that, because there is joint use with communications companies, FPL paid [redacted] every time it installed a pole in order to "set joint use poles that are 10 feet taller than [FPL] needs to serve its electric customers (i.e., 4 feet for AT&T + 3'4" for communication space and an additional 1 foot of pole burial space.)"[79] The data rebuts each of these claims.

40. With respect to the 10-foot claim, Mr. Kennedy admits that FPL does *not* reserve four feet of space for AT&T on its poles, and that AT&T, at most, requires 1.18 feet of space.[80] There is no reason to add 10 feet to a pole to accommodate an approximately 1-foot attachment.

---

[77] Ibid, ¶ 19.

[78] Ibid, ¶ 10.

[79] Ibid, ¶ 9.

[80] Ibid, ¶¶ 11, 29. FPL repeats this 4-foot claim as a separate "flexibility" alleged advantage, ibid, ¶ 20, but it is no more valid there considering FPL's admission that it does not, in fact, reserve 4 feet of space for AT&T.

Mr. Kennedy also admits that he allocates 3.33 feet of safety space to AT&T, but that space is required for *all* communications attachers, and not just for AT&T.[81] AT&T is certainly not the "cause" of that space, which the FCC has held is "usable and used by the electric utility."[82]

41. With respect to pole height, Mr. Kennedy does not specify any particular heights, but he bases his cost estimates on the difference between a 35- and a 45-foot pole.[83] This is inconsistent with Mr. Kennedy's testimony that FPL's average pole height is a 40-foot pole.[84] And it is entirely unrealistic to suggest that, but for the JUA, FPL would have installed a network of 30-foot poles—10 feet shorter than its 40-foot average pole height. Indeed, FPL previously represented that, when not engaged in joint use, "[e]lectric utilities use 30-50 foot poles" as compared to "telephone utilities[, which] use smaller, 25-35 foot poles."[85] But Mr. Kennedy's use of a 45-foot pole in his cost estimates is no more realistic because FPL did not install 45-foot poles because of the JUA. The JUA defines a "normal joint use pole" as a 35- or a 40-foot pole.[86]

42. Indeed, data show that AT&T is not the reason for the height of FPL's poles. Public data from FPL's last pole attachment rate proceeding shows that FPL installed comparable height poles regardless of whether AT&T was attached. Table 1 summarizes this data, which shows in column (a) that 80 percent of FPL's poles *without any third-party*

---

[81] Ibid, ¶ 9.

[82] *Consolidated Partial Order*, ¶ 51.

[83] Kennedy Decl., Exs. C, D.

[84] Ibid, ¶ 28.

[85] *Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98, Reply Comments of the Electric Utility Coalition, August 11, 1997, p. 8 (footnotes omitted). The Electric Utility Coalition consisted of FPL, Carolina Power & Light, Delmarva Power & Light, Atlantic City Electric Company, Entergy Services, Pacific Gas & Electric, Potomac Electric Power, Public Services of Colorado, Southern Company, Georgia Power, Alabama Power, Gulf Power, Savanah Electric, Tampa Electric, and Virginia Power.

[86] See JUA, Section 1.1.5.

attachments were taller than 30 feet and 69 percent are taller than 35 feet. This alone invalidates Mr. Kennedy's claim that FPL would install an entire network of 30-foot or 35-foot poles but for the JUA. The table also shows in column (c) that 90 percent and 76 percent of poles *with a non-ILEC attachment* were taller than 30 feet and 35 feet, respectively.

Table 1. FPL and Verizon Pole Percentages by Size
2013

	FPL Poles			Verizon
	Only FPL Attachments (a)	Joint-Use Pole (b)	Third-Party But No Verizon Attachments (c)	Joint-Use Pole (d)
30' & shorter	19.6%	13.4%	10.1%	45.1%
35'	11.5%	18.2%	14.1%	35.7%
40'	51.3%	58.4%	49.1%	18.2%
45'	13.1%	8.2%	20.3%	0.9%
50' & higher	4.6%	1.9%	6.5%	0.1%
Poles	100,765	67,159	38,799	7,018
% over 30'	80.5%	86.7%	90.0%	54.9%
% over 35'	69.0%	68.5%	75.9%	19.2%

Source: Adapted from the Affidavit of Timothy J. Tardiff, Ph.D., *Verizon Florida LLC. v. Florida Power and Light Company*, Docket 15-73, March 13, 2015, Table 1.

43. The table is also helpful because it shows the error in FPL's failure to consider the "reciprocal" nature of any of its alleged advantages. The table is consistent with the fact that the company that had to install relatively taller poles to accommodate joint use was the ILEC, and not the electric utility. Specifically, in the case of Verizon, 45 percent of its poles were shorter than 30-foot poles, as compared to about 20 percent of FPL's poles.

44. FPL similarly ignores the reciprocal nature of the alleged "advantage" when it contends that AT&T enjoys the "time value" of money based on the timing of FPL's invoice.[87]

[87] Kennedy Decl., ¶ 12.

FPL pays AT&T for pole attachment rent at the same time AT&T pays FPL because FPL's invoice reflects the *net* amount due when FPL's rent for use of AT&T's poles is subtracted from AT&T's rent for use of FPL's poles. Mr. Kennedy instead bases his valuation solely on the "amount AT&T owed for its attachments to FPL's poles using the joint use rate."[88] There are several other errors in his valuation that lead to his inflated [redacted] valuation (using the 2017 rental year as an example). As an initial matter, he incorrectly uses the amount FPL invoiced at the JUA rates, instead of using a properly calculated new telecom rate.[89] But to isolate any alleged "competitive" value from the timing of AT&T's payment, it must be assumed that AT&T is paying the same competitively neutral new telecom rate guaranteed its competitors. He also uses an inflated [redacted] percent rate (for the 2017 rental year), which he takes from Ms. Deaton's declaration, who, in turn, selected the FCC's default rate of return for calculating rates for use of ILEC poles.[90] But a *regulated* rate of return *for ILECs* does not represent FPL's time value of money. Were AT&T to be invoiced earlier, FPL could invest the money at a risk-free rate, which provided annual interest of between 0.12 percent (in 2014) and 2.33 percent (in 2018).[91]

45. Mr. Kennedy also inflates his valuation by apparently miscalculating the time period associated with any delay. The methodology of his calculation is not at all clear; he claims that AT&T's competitors make two payments "in June and December of the billing year," but he

[88] Ibid, ¶ 12, fn. 19.

[89] Ibid

[90] Deaton Decl., p. 4.

[91] See U.S. Department of the Treasury, Daily Treasury Bill Rate Data, https://www.treasury.gov/resource-center/data-chart-center/interest-rates/Pages/TextView.aspx?data=billrates.

then assumes that they make three payments in his calculation.[92] And, while AT&T typically pays in March of the year following a rental year, that does not mean that AT&T is competitively advantaged. According to FPL's answer to AT&T's interrogatory number 5, which is also difficult to decipher, it appears that the timing of AT&T's payment is comparable or less advantageous than the timing of its competitors' payments. This is because FPL's pole costs have been significantly increasing year over year, which means that the vintage of the pole costs used to calculate a particular rate must be part of the analysis. Using FPL's 2016 pole costs as an example, FPL appears to charge AT&T's competitors a rate based on 2016 pole costs semi-annually in December 2017 and June 2018.[93] Had FPL charged AT&T the new telecom rate AT&T requests, FPL would have invoiced AT&T in March 2018 based on the same 2016 pole costs.[94] That timing difference is not an advantage because AT&T's annual payment falls squarely between its competitors' semi-annual payments. However, AT&T's invoice would have been for 2017 rent, while its competitors' invoices may be for 2018 rent. AT&T, then, would be disadvantaged, as it would pay rates reflecting the increase in FPL's pole costs a rental year *earlier* than its competitors. FPL, therefore, has not shown that the "time value of money" is a competitive advantage for AT&T.

46. The other alleged advantages in Mr. Kennedy's list repeat many of these same flaws. Mr. Kennedy argues that some of "AT&T's alleged competitors" are required to "purchase a bond … to cover the cost of removal of their facilities, if necessary."[95] [redacted]

[92] Kennedy Decl., ¶ 12.

[93] Reply Ex. 5; FPL's Resp. to AT&T's Interrog. No. 5.

[94] See Rhinehart Aff., Ex. R-1.

[95] Kennedy Decl., ¶ 26.

But in any event, AT&T extends the same courtesy to FPL, resulting in no net benefit to AT&T. Mr. Kennedy makes the same error with respect to insurance, stating in a conclusory fashion that "[o]ther telecom providers must meet a more stringent insurance requirement, which cost them more."[96] But FPL is also not required to purchase this undefined "more stringent insurance" to share poles with AT&T, and so there is no net benefit to AT&T as compared to its competitors.

47. Many of Mr. Kennedy's alleged valuations are based on pure guesswork. They ignore the fact that AT&T incurs the same costs to complete comparable work when preparing to attach to a pole, or surveying the pole after an attachment is made.[97] In the end, each alleged benefit suffers from methodological flaws that confirm that the JUA does not provide AT&T competitive benefits, let alone net material competitive benefits, that could justify an upward departure from the new telecom rate that presumptively applies. It is therefore my opinion that the new telecom rate is the competitively neutral rate, and thus the rate that should be charged to AT&T.

II. FPL CONFIRMED THAT ITS RATES EVIDENCE ITS POLE OWNERSHIP ADVANTAGE

48. FPL has not only failed to rebut the new telecom rate presumption, but it has confirmed that the JUA rates are unjust and unreasonable and reflect FPL's exercise of its pole ownership advantage. In my initial affidavit, I explained that FPL has been able to continue charging unreasonably high rental rates over the course of the JUA because of the bargaining power it enjoys by virtue of the significant disparity in pole ownership between FPL and AT&T. The claims advanced by Mr. Kennedy exemplify FPL's disregard of the FCC's competitive

[96] Ibid, ¶ 24.

[97] Peters Reply Aff., ¶ 15.

concerns and its intention to use its pole ownership advantage to continue charging the JUA rates.

49. The essence of Mr. Kennedy's argumentation is that the JUA rates are just and reasonable because they are lower than AT&T's other options. For instance, Mr. Kennedy argues that a rate should be acceptable so long as it is "a value less than AT&T's other options,"[98] which Mr. Kennedy explains would have been "building its own pole line, undergrounding its facilities, or wireless to home offer."[99]

50. This argumentation makes the very point that I made in my initial affidavit. FPL understands that AT&T's deployment alternatives are more expensive than the JUA rates, and so FPL can leverage its bargaining power to demand ever-increasing rental rates. This is the very definition of the abuse of a dominant bargaining position. FPL acknowledges that it need not charge competitive prices because it can price up to the cost of AT&T's far costlier alternatives.

51. This argument also refutes the contrary argument of FPL's witness, Mr. Zarakas, that AT&T's pole ownership percentage was somehow enough to discipline FPL's rates.[100] Mr. Zarakas postulates that "[i]t would be irrational for FPL to engage in a game of brinksmanship with AT&T, irrespective of any potential differences between FPL and AT&T in harm associated with loss of the joint use agreement."[101] However, this is exactly what FPL has done in claiming that "FPL could have charged AT&T market rates for attaching to FPL's poles."[102]

---

[98] Kennedy Decl., ¶ 7.

[99] Ibid It is unclear what Mr. Kennedy refers to with the term "wireless to home offer" because AT&T is an ILEC that provides wireline service.

[100] Zarakas Decl., ¶ 25.

[101] Ibid

[102] Kennedy Decl., ¶ 7.

In addition, FPL proudly declares that it has filed suit to have AT&T removed from its poles, something that it describes as part of "collection efforts."[103] But FPL admits that over four months ago, AT&T paid all disputed amounts invoiced in full.[104] This is the very definition of a game of brinksmanship. Thus, FPL's own responses prove that Mr. Zarakas' claim is wrong.

52. It is also telling that Mr. Kennedy's affidavit makes no mention of competitive neutrality. If FPL bases CLEC and CATV attacher rates on the FCC's new telecom formula and seeks to perpetuate the JUA rates because they are lower than the cost of a duplicative pole network, it is impossible ever to achieve the competitive neutrality the Commission seeks.

III. MR. ZARAKAS' ARGUMENTS ARE UNSUPPORTED AND FALSE

53. Finally, I must respond to Mr. Zarakas' testimony, which is based primarily on his uncritical acceptance of information relayed to him by FPL. Mr. Zarakas also mischaracterizes my testimony in several places. For instance, Mr. Zarakas repeatedly argues that my conclusion that FPL has superior bargaining power was based solely on a "review of the percentage FPL ownership in the FPL-AT&T joint pole network and upon representations made by AT&T personnel concerning FPL's behavior during negotiations and other communications with AT&T."[105] My initial affidavit speaks for itself, and although I did consider these factors, they were certainly not the only considerations I used in reaching my conclusions.

54. Mr. Zarakas mounts three arguments, but they do not demonstrate that the JUA rates are just and reasonable. First, although acknowledging the declining pole ownership ratio,

[103] Answer ¶ 17.

[104] FPL Brief, p. 13.

[105] Zarakas Decl., ¶ 16.

he claims that it is due to AT&T's failure to build new poles[106] and that it "largely reflects AT&T's own preferences."[107] Mr. Zarakas added, "The change in the percentage of AT&T's pole ownership was thus due to AT&T's own initiatives; it could have maintained or increased the pole ownership ratio that was in place in 1975 by building out more poles."[108] Mr. Zarakas' statement is not only factually incorrect but is also unrealistic and socially undesirable. As Mr. Kennedy states (in the same paragraph Mr. Zarakas relies on for his statement), the changing ownership percentage in the recent past was "primarily due to FPL's FPSC-ordered storm hardening initiatives, which were required to be implemented after the devastating 2004 and 2005 hurricane season."[109] Thus, it is not that AT&T failed to install new poles; it is that FPL was *required* to install new poles. And, in any event, duplication of FPL's pole network by AT&T or any other party is neither economically feasible nor socially desirable.[110]

55. Second, Mr. Zarakas argues that AT&T had the opportunity to sell its poles and get regulated pole access.[111] But Mr. Zarakas' only support for this alleged opportunity is a reference to one paragraph in Mr. Kennedy's declaration that does not state that an offer was ever made, let alone that it guaranteed pole access or new telecom rates.[112] In fact, Mr. Kennedy admits that a sale of AT&T poles was simply an "idea."[113] Mr. Zarakas does not, and cannot, offer any judgment on the seriousness of an offer that was never made (price, terms, or

[106] Ibid, ¶ 5.

[107] Ibid, ¶ 20.

[108] Ibid, ¶ 5, citing to Kennedy Decl., ¶ 8.

[109] Kennedy Decl., ¶ 8.

[110] See, e.g., *Pole Attachment Order*, ¶ 4.

[111] Zarakas Decl., ¶ 16.

[112] Ibid, ¶ 16, fn. 15, referencing Kennedy Decl., ¶ 36.

[113] Kennedy Decl., ¶ 36.

conditions), nor can he reasonably read a preference into AT&T's failure to follow up on FPL's "idea." Waiting for FPL to make an offer FPL is considering is hardly evidence of a preference, let alone an indication that AT&T is willing to pay nearly [redacted] times the new telecom rates that presumptively apply.

56. Finally, Mr. Zarakas claims that I did not "demonstrate that AT&T does not enjoy material benefits under the joint use agreement compared to what CLECs receive under leased pole attachment arrangements."[114] I disagree, although the criticism is itself irrelevant because the Commission expressly placed the burden *on FPL* to prove with clear and convincing evidence that the JUA provides AT&T net material advantages as compared to AT&T's competitors.[115] Mr. Zarakas certainly does not try to meet that standard. His declaration is void of any analysis or discussion of net benefits. Mr. Zarakas instead simply repeats his incorrect understanding that FPL offered to purchase AT&T's poles (FPL did not) and claims that AT&T's failure to accept FPL's non-offer "reveals that [AT&T] finds value in the arrangements for pole attachments provided under the joint use agreement over that afforded under lease arrangements."[116]

57. Of course, AT&T's failure to respond to an offer that FPL never made cannot reveal anything about AT&T's opinion of the JUA rates. But setting that aside, Mr. Zarakas' argument is irrelevant to the question of whether the JUA provides AT&T net material benefits

[114] Zarakas Decl., ¶ 3 ("nor did he demonstrate that AT&T does not enjoy material benefits under the joint use agreement compared to what CLECs receive under leased pole attachment arrangements.") See also ibid, ¶ 7 ("joint use agreements typically provide ILECs with benefits that are not similarly conveyed to non-ILECs. FPL indicates that this is the case with respect to the FPL-AT&T joint use agreement….").

[115] *Third Report and Order*, ¶ 128.

[116] Zarakas Decl., ¶ 24.

as compared to its competitors for use of FPL's poles. Indeed, AT&T's pole ownership status is irrelevant to what AT&T should be paying as a just and reasonable and competitively neutral rate to attach to FPL's poles. By statute, "the rates, terms and conditions of [I]LECs' pole attachments [must be] just and reasonable."[115] Selling poles is not a prerequisite.

IV. CONCLUSION

58. I have carefully reviewed and considered FPL's Answer, Brief in Support of Answer, and supporting declarations. The arguments FPL presented are contrary to the FCC's deployment and competition goals and that the positions of Mr. Kennedy and Mr. Zarakas are of little value to the present matter. My conclusion remains that the pole attachment rates that FPL has charged AT&T have not been and will not be just, reasonable, and competitively neutral. I recommend that the FCC set the just and reasonable rate for AT&T's use of FPL's poles as the properly calculated per pole new telecom rate because FPL has not shown that the JUA provides AT&T net benefits that provide it a material advantage over its CLEC and CATV competitors.

District of Columbia

Signed and sworn to (or affirmed) before me on 11/06/2019 by Darlene Francesca Rogers

Notary Public
My Commission Expires: 08/14/2024

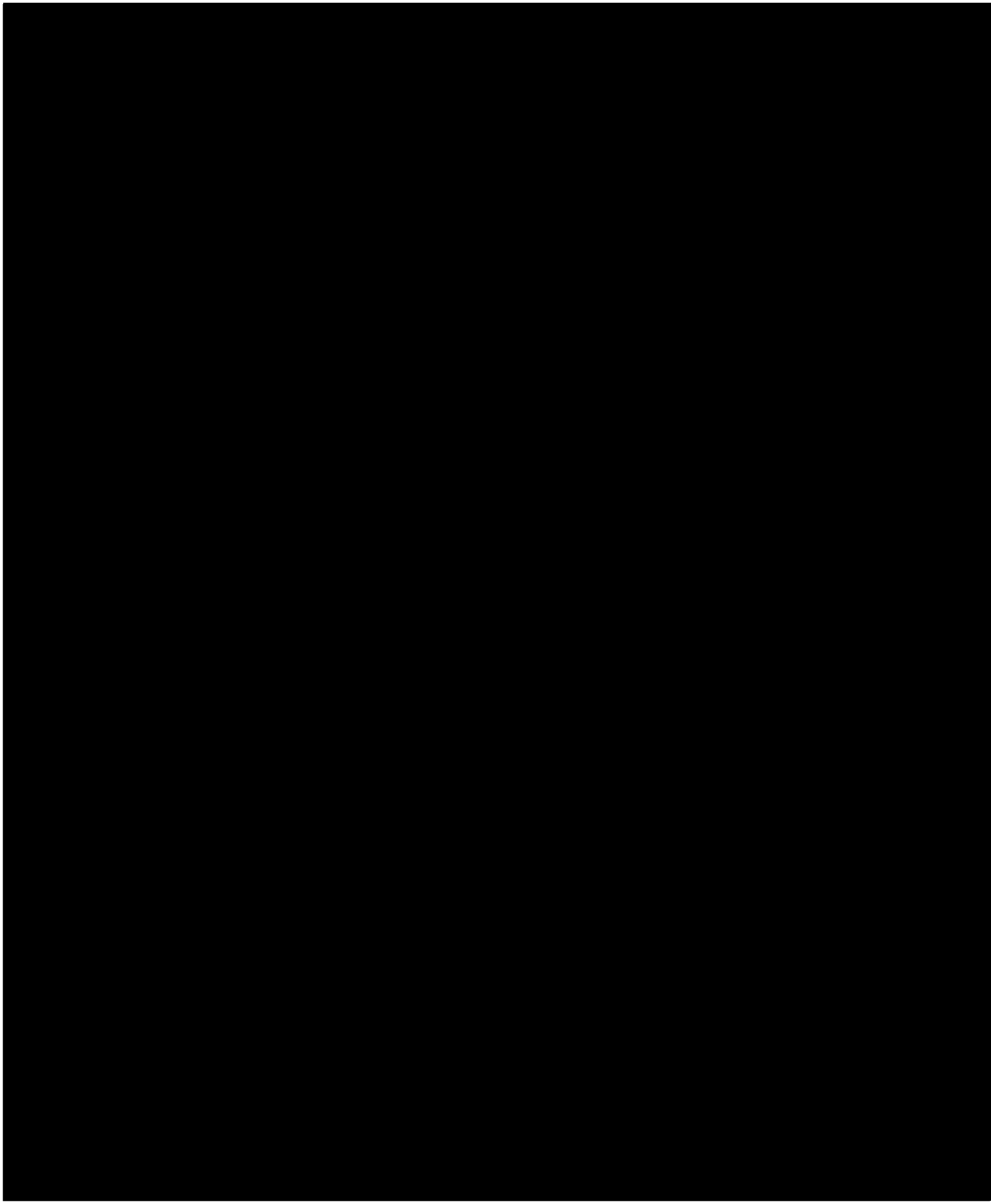
Christian M. Dippon, Ph.D.

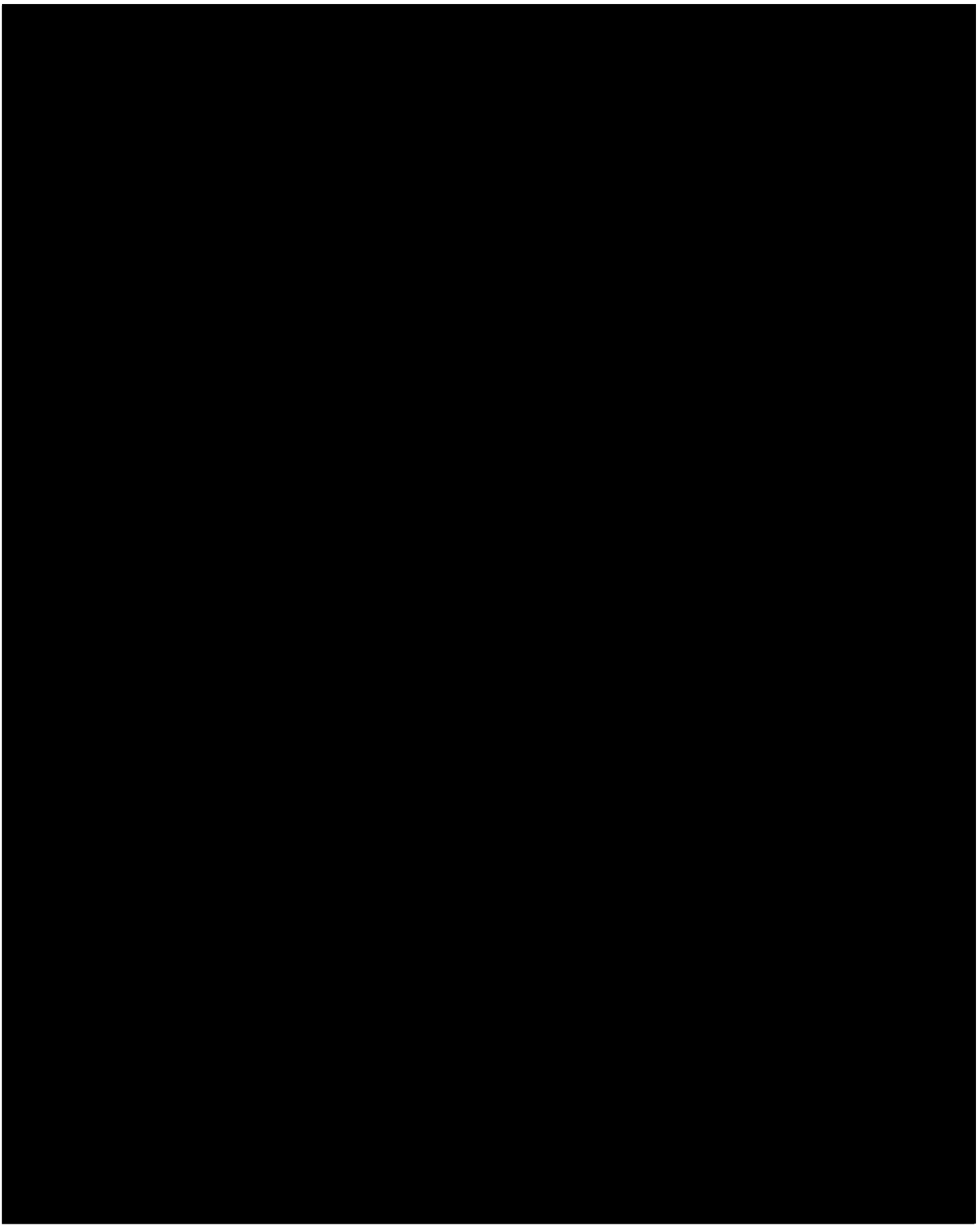
Sworn to before me on
this 6th day of November 2019

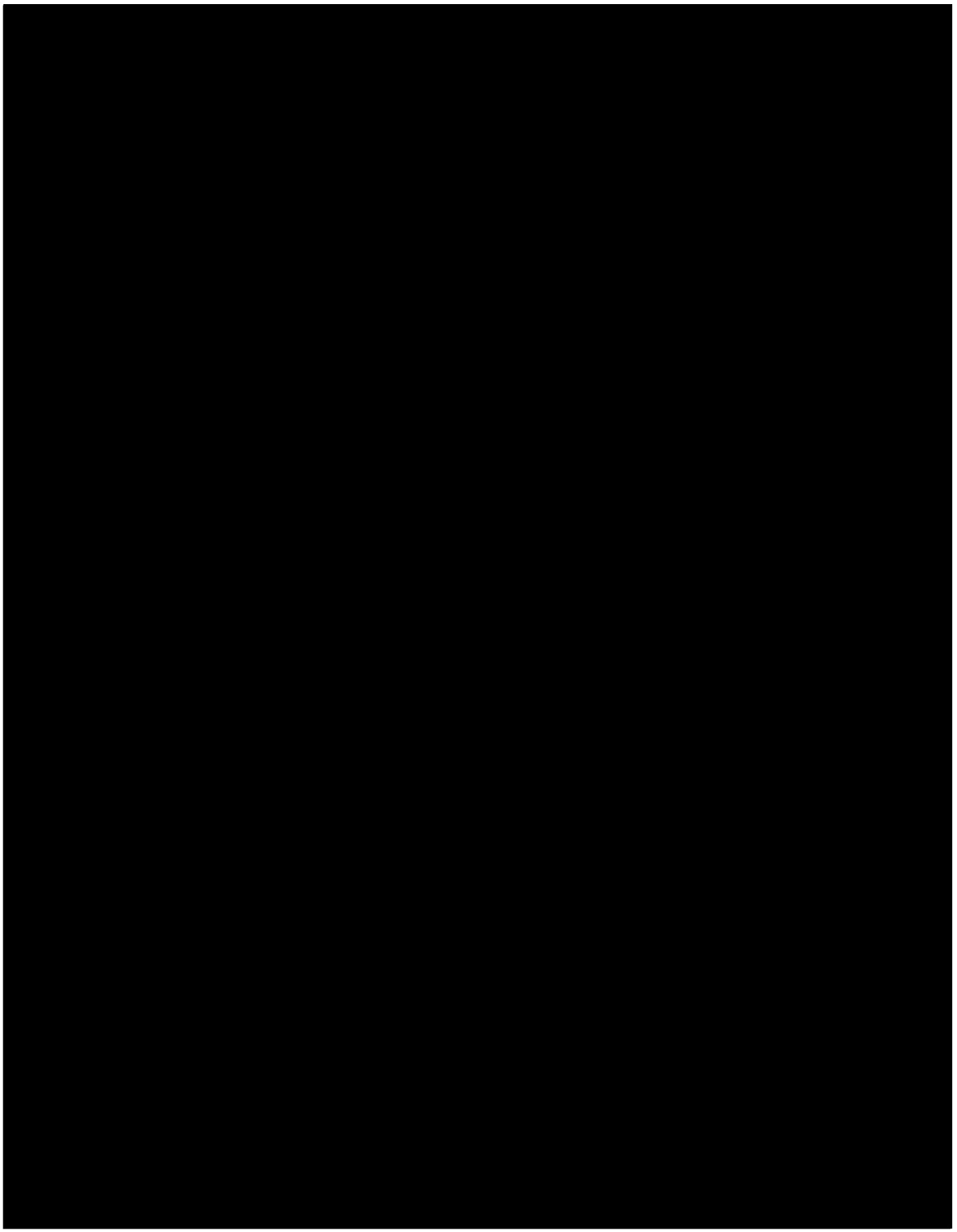
Notary Public

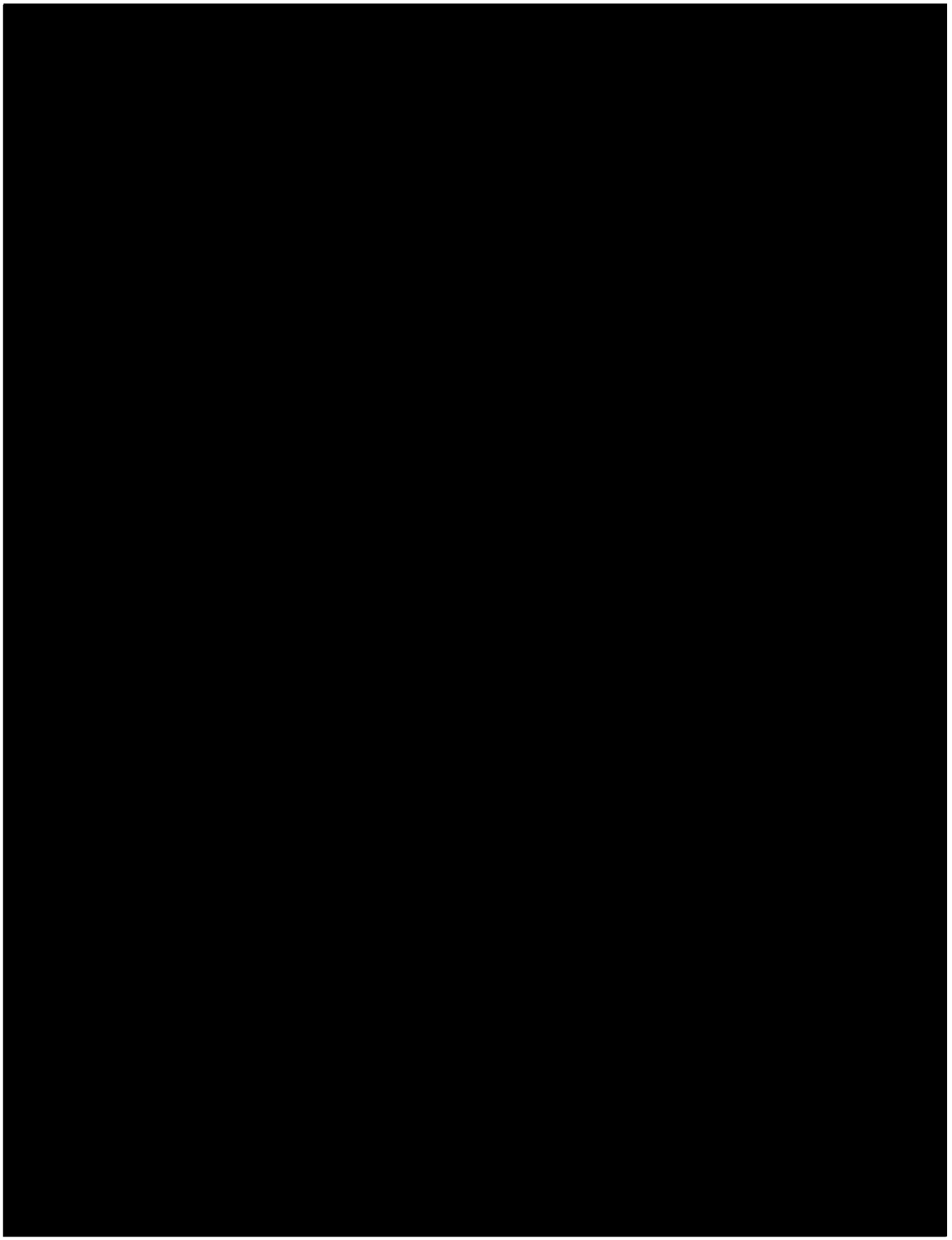
[115] *Pole Attachment Order*, ¶ 204; 47 U.S.C. § 224.

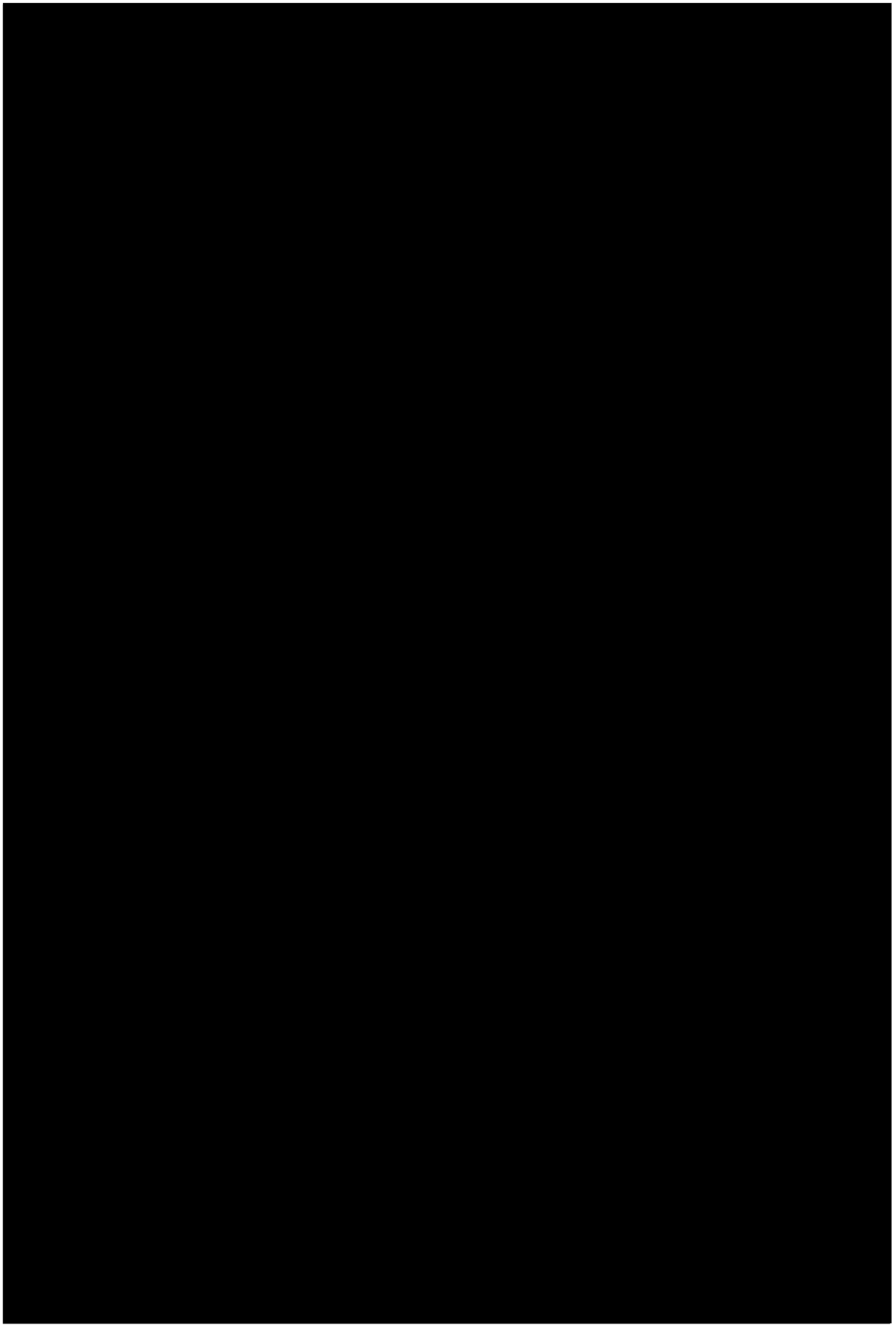
Exhibit 1

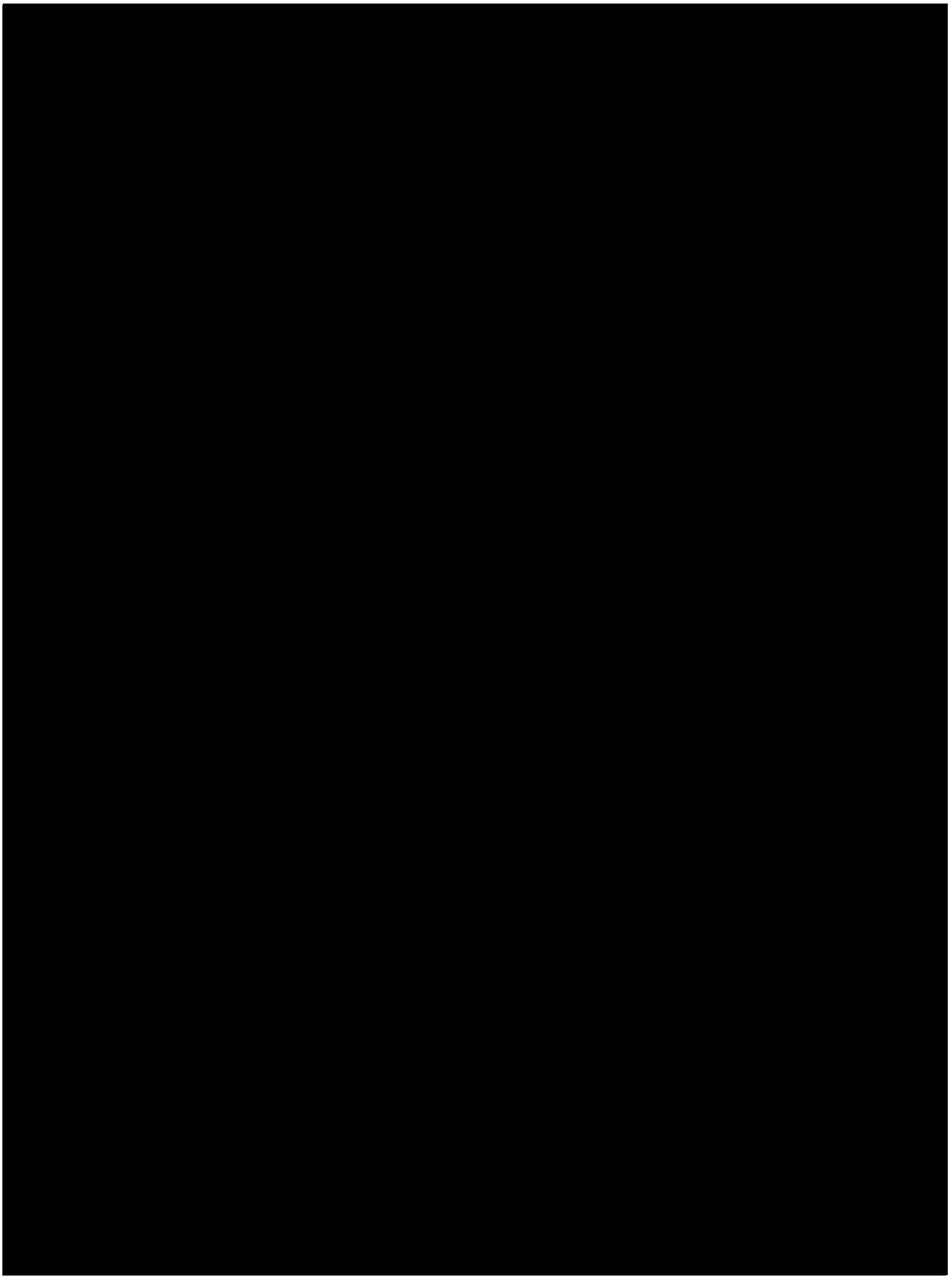


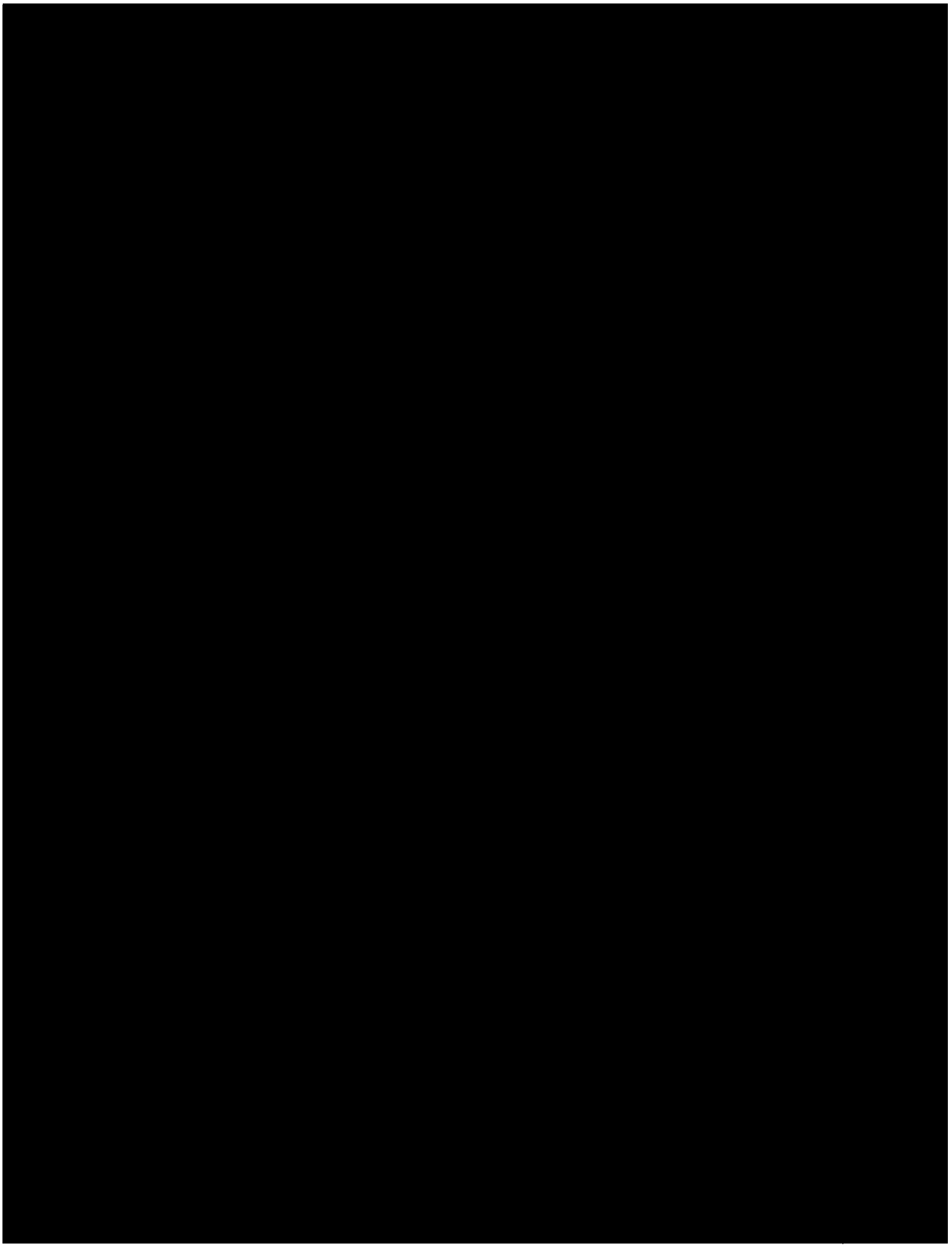


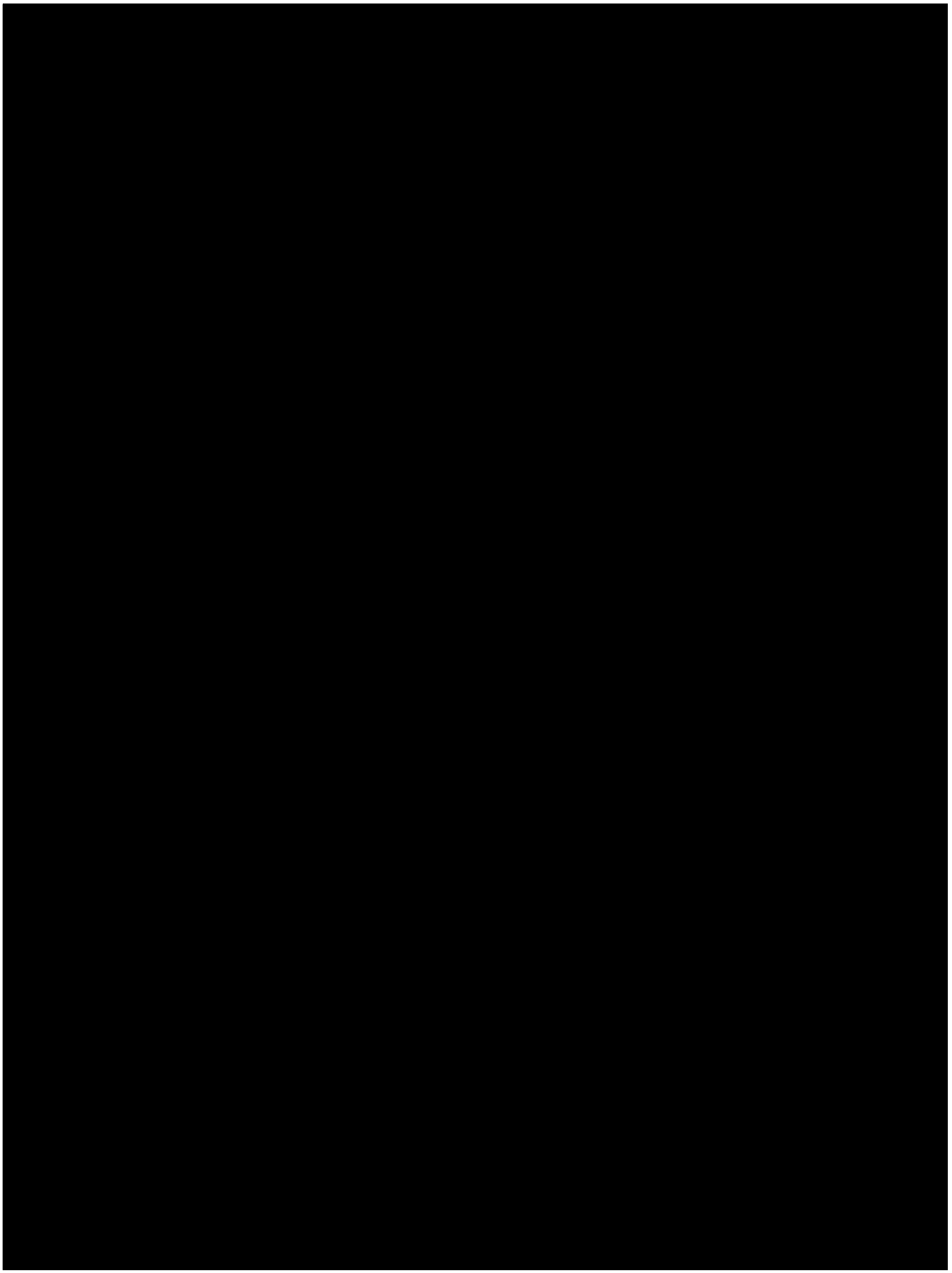


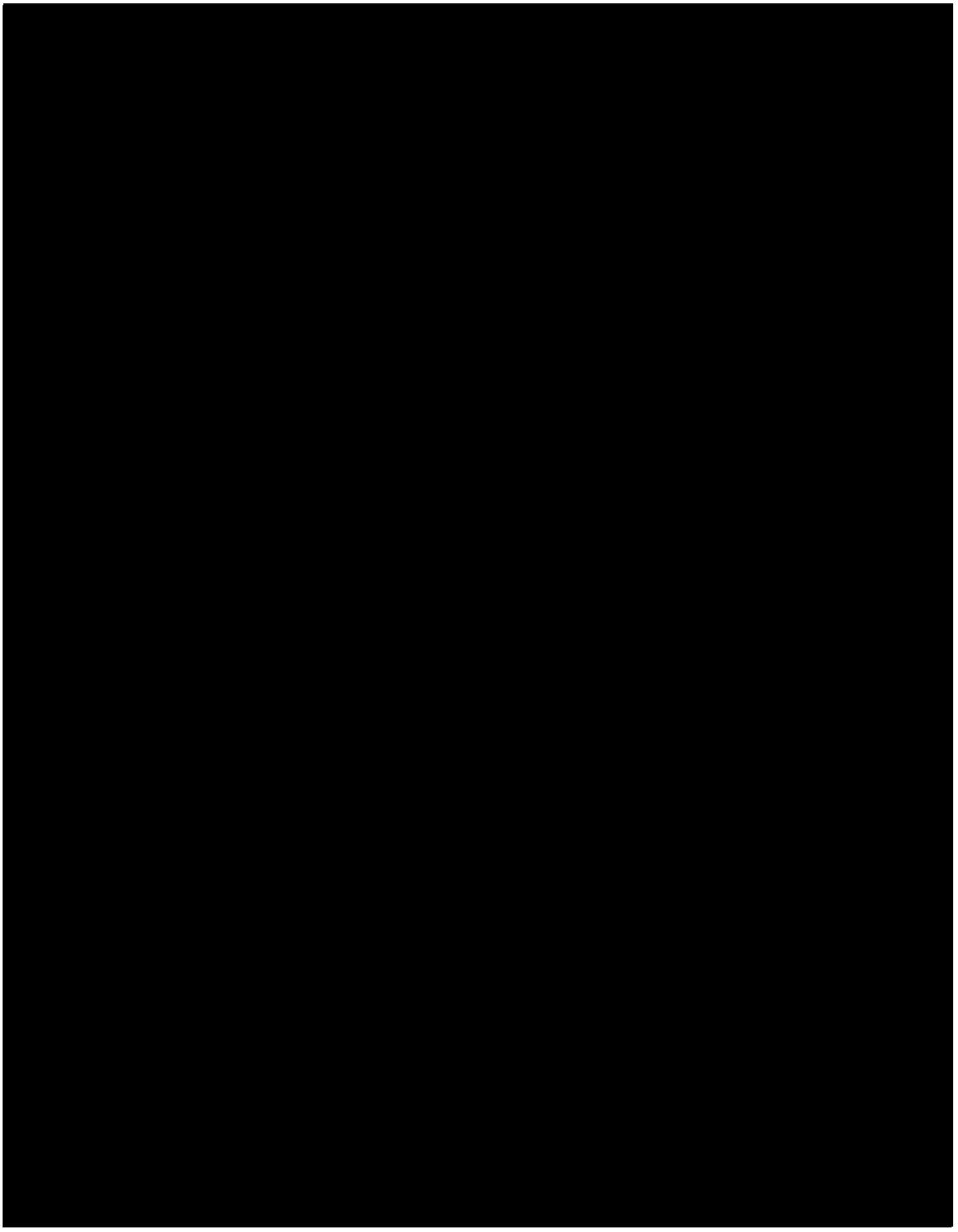


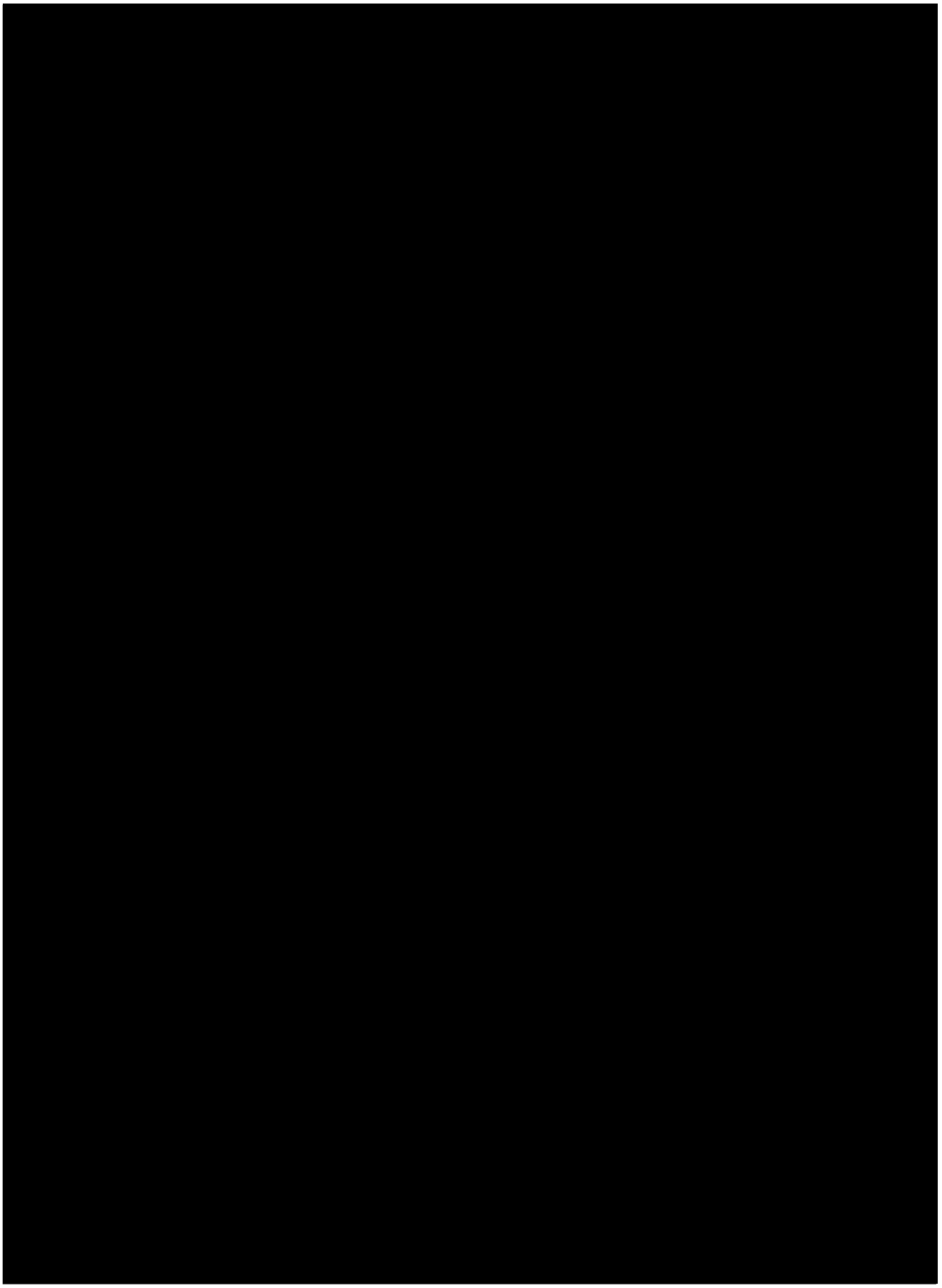


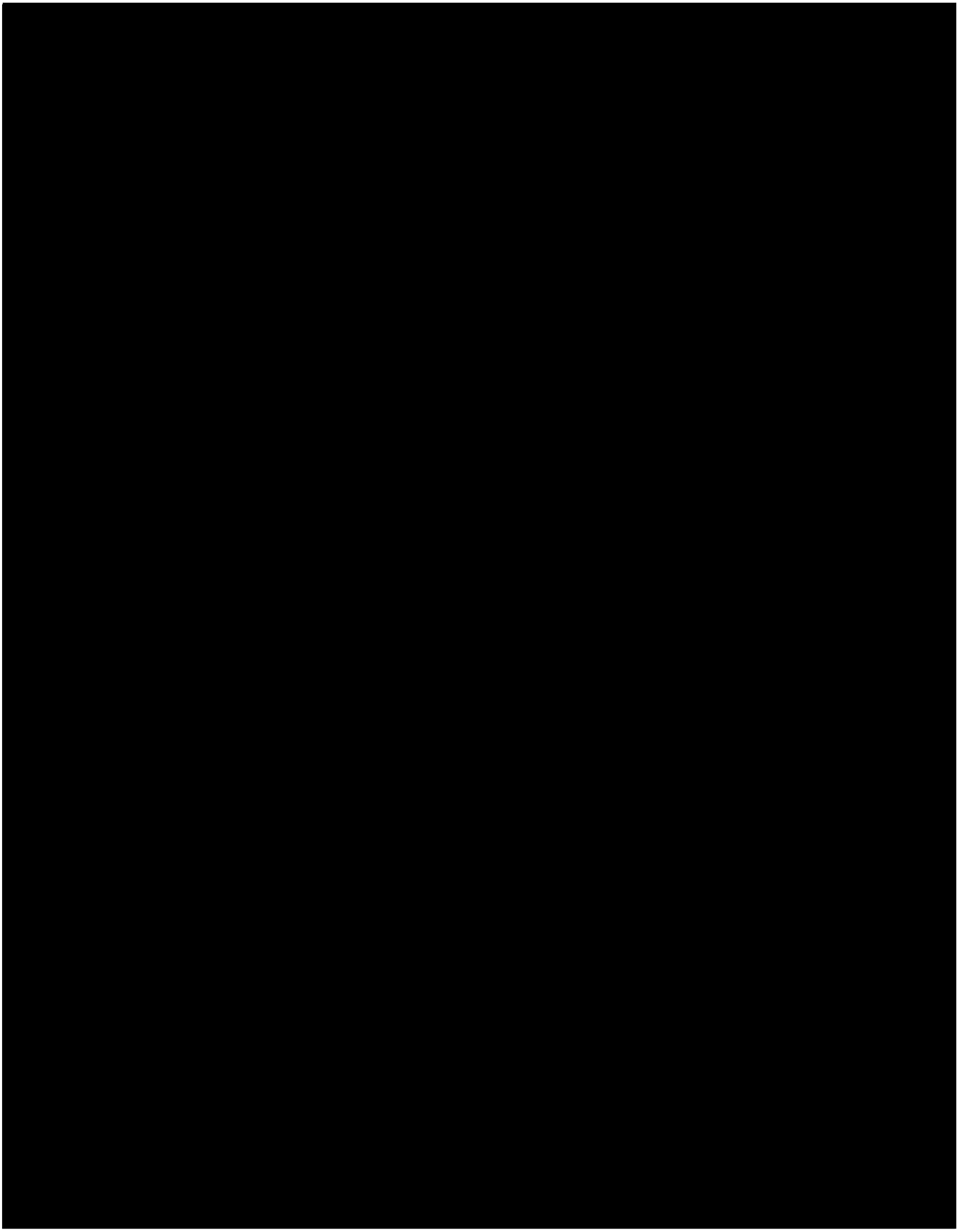


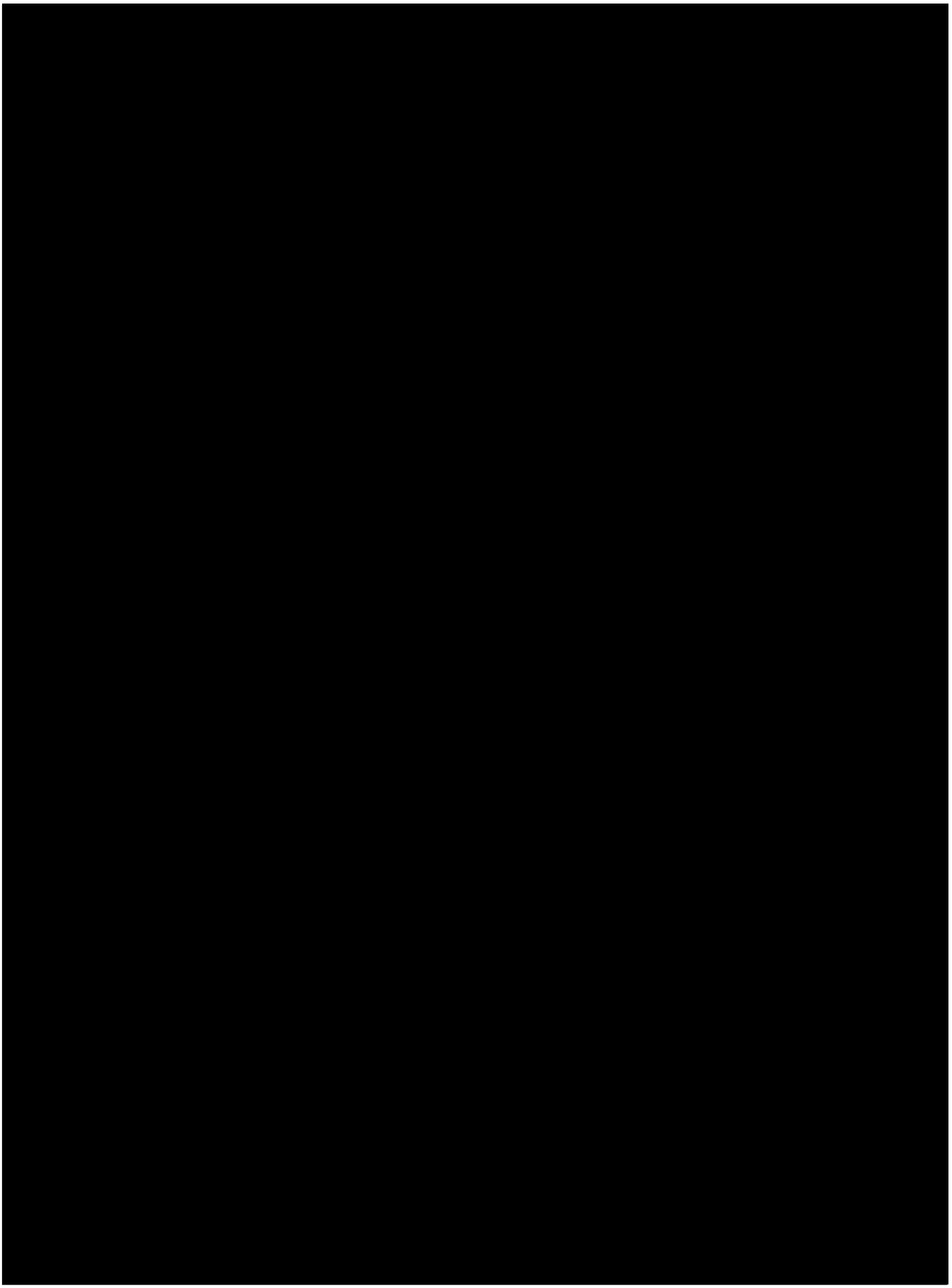


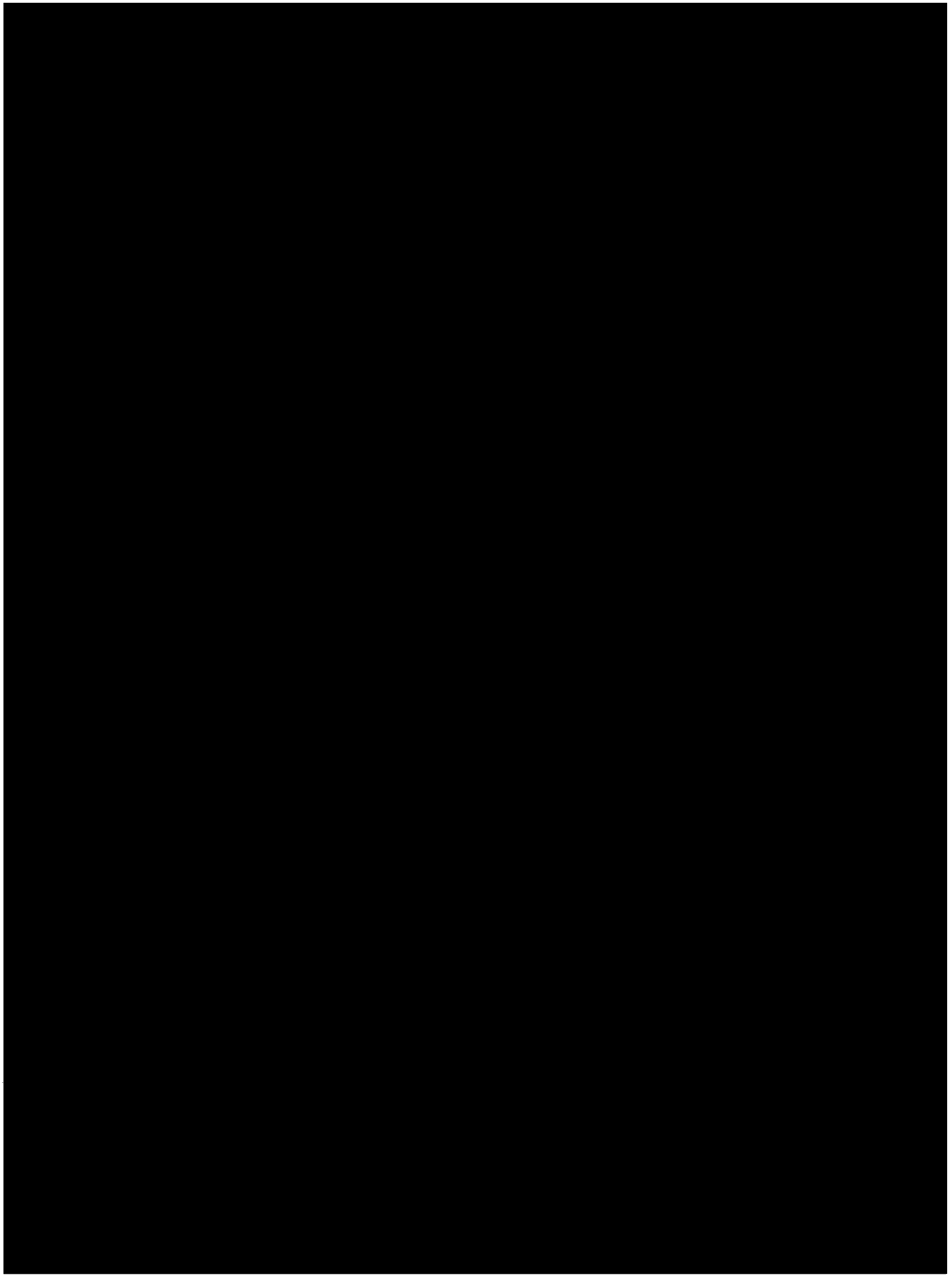


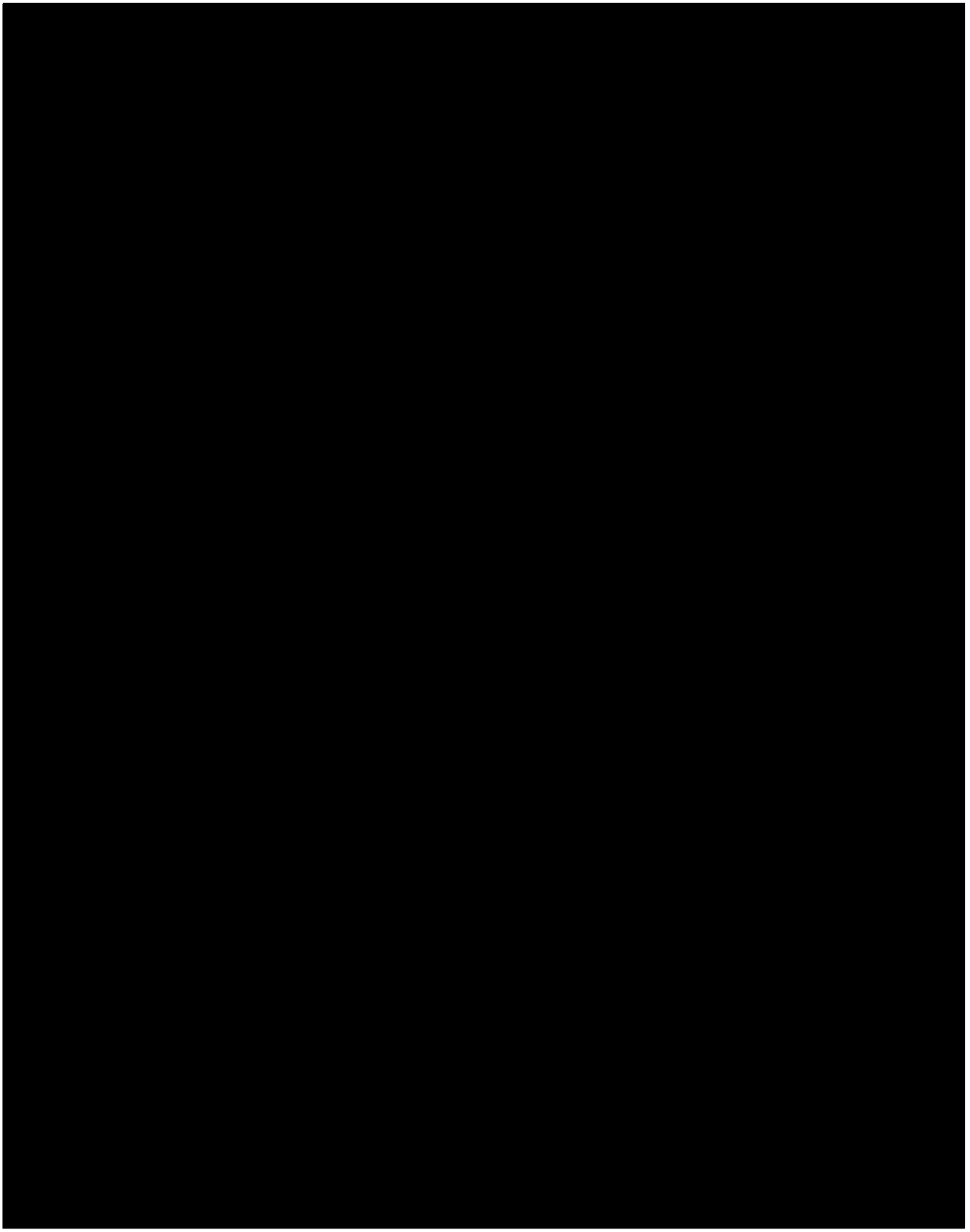


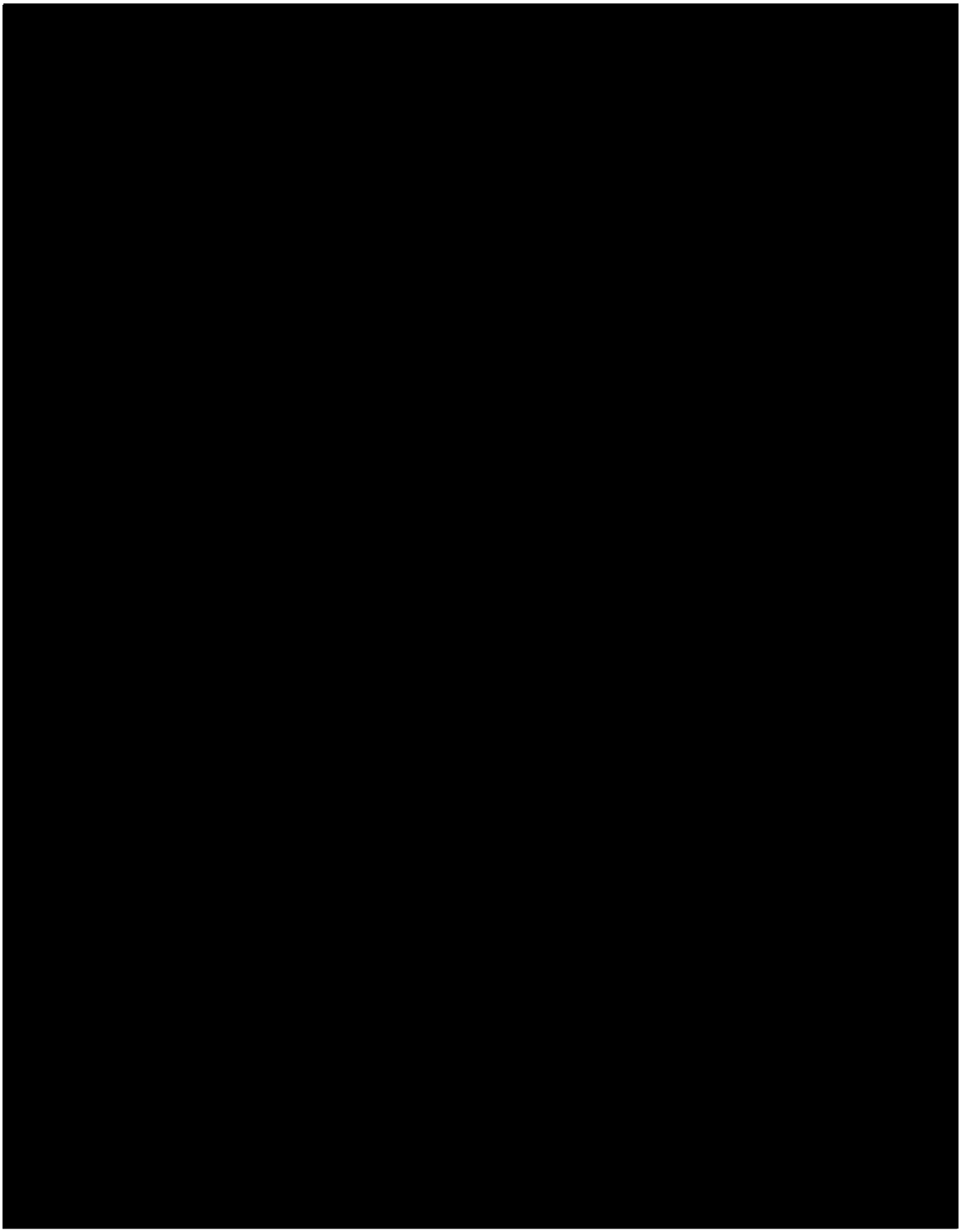


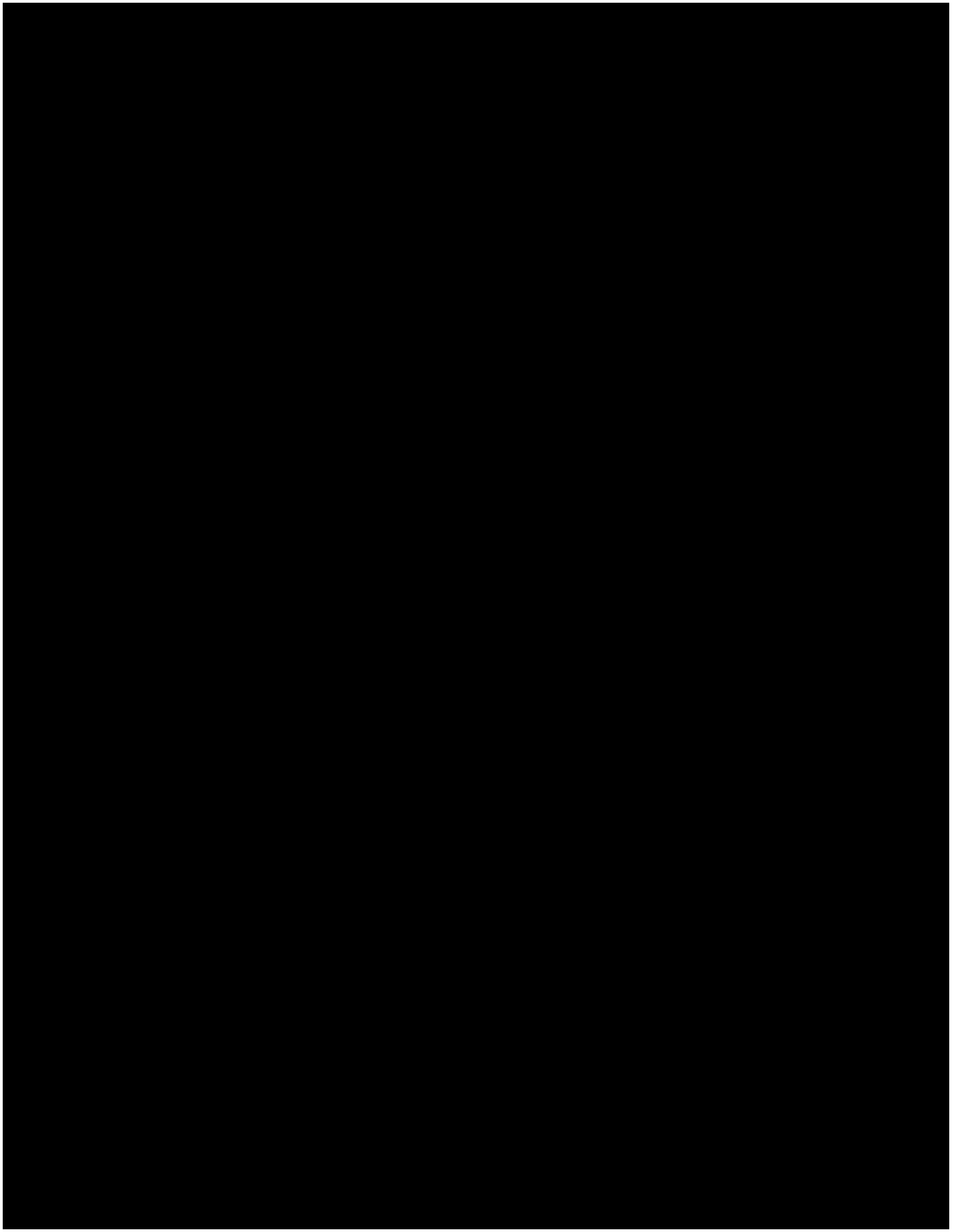


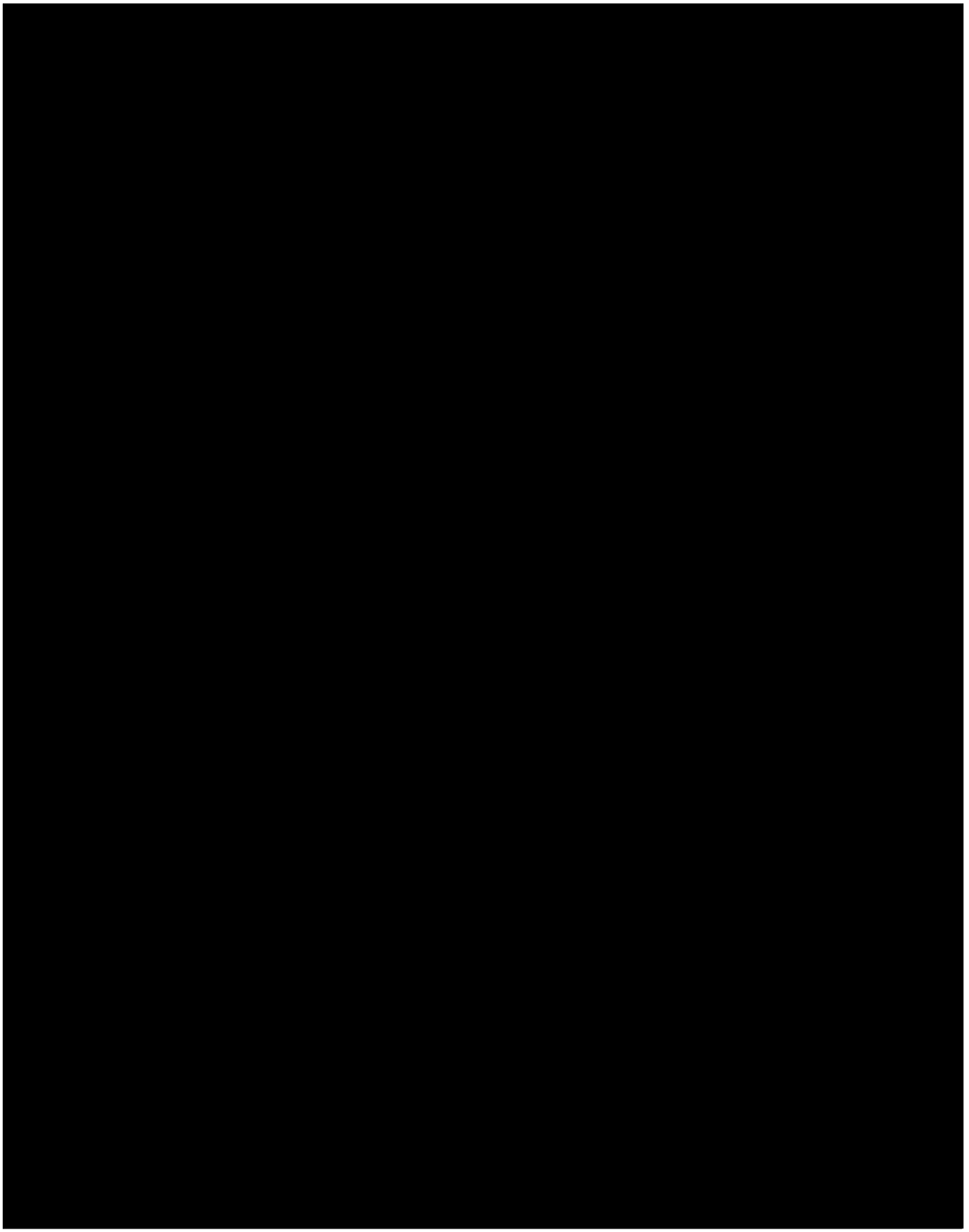


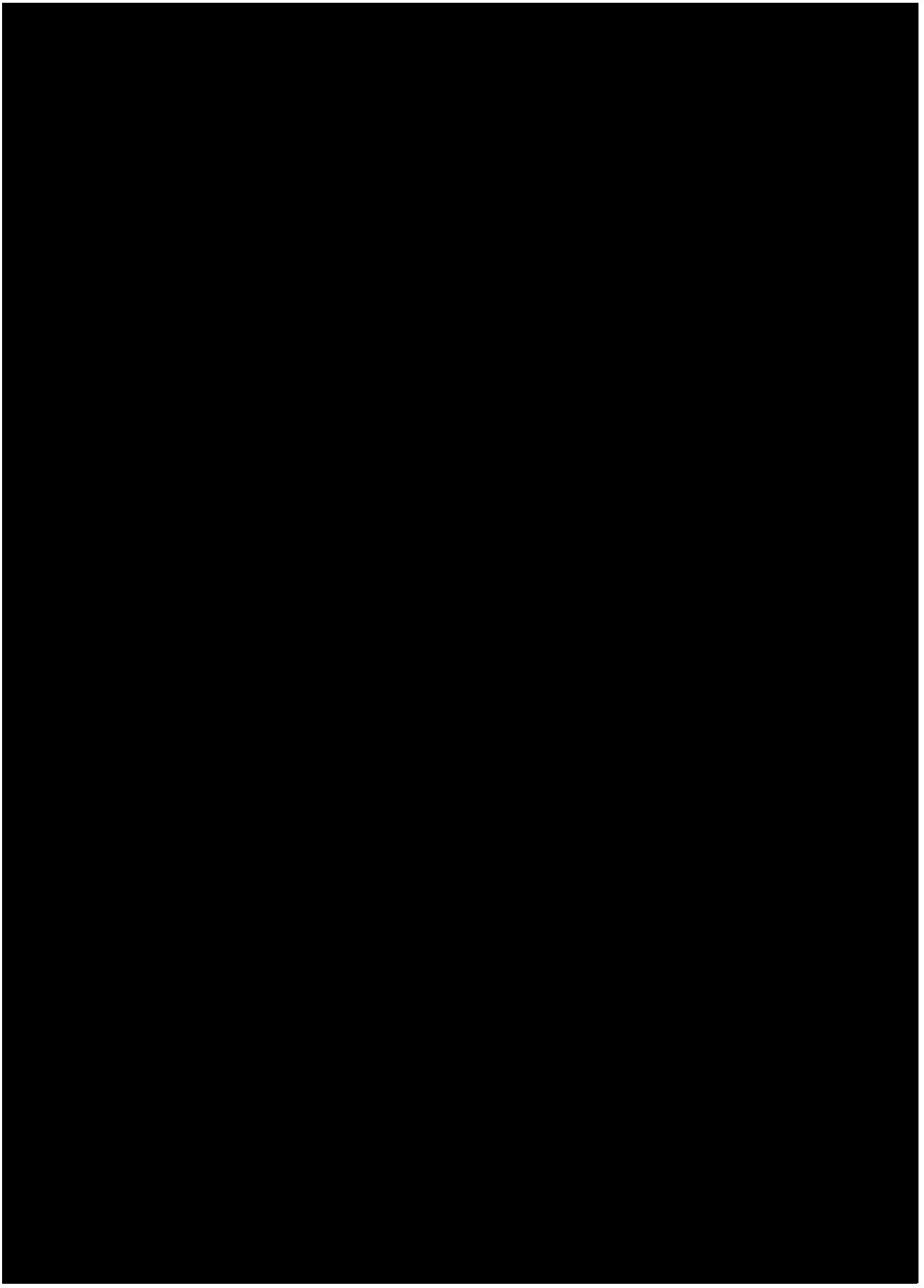


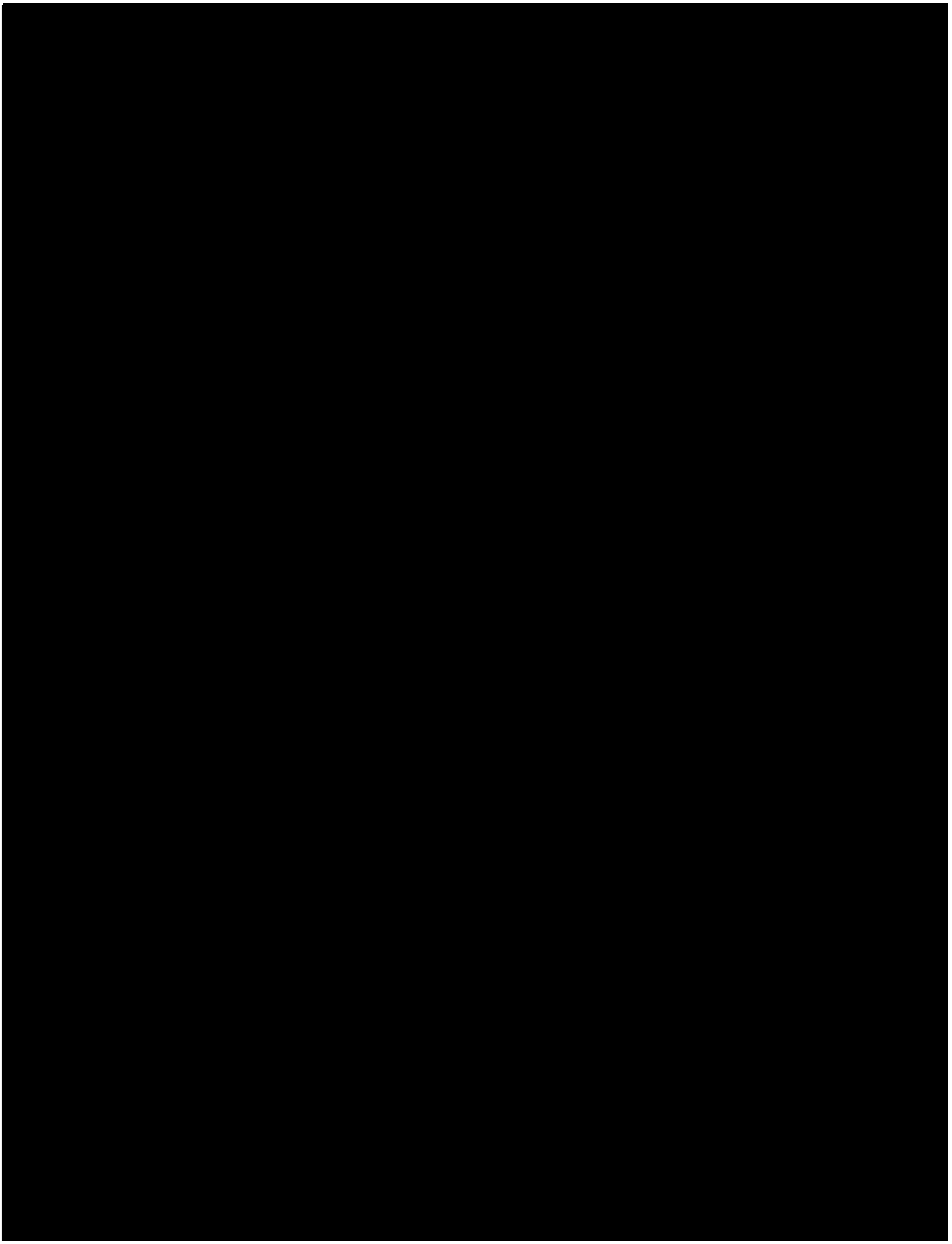


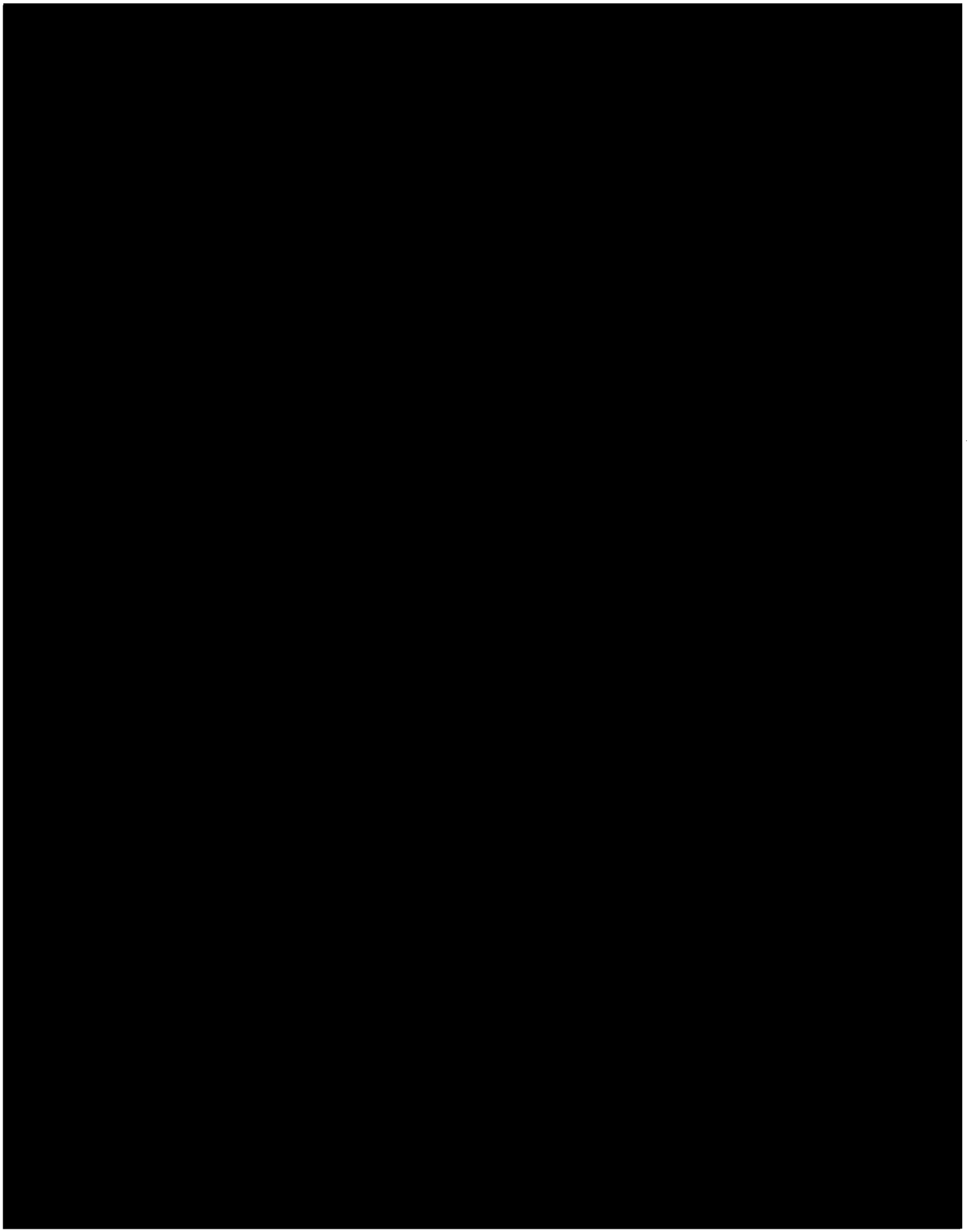












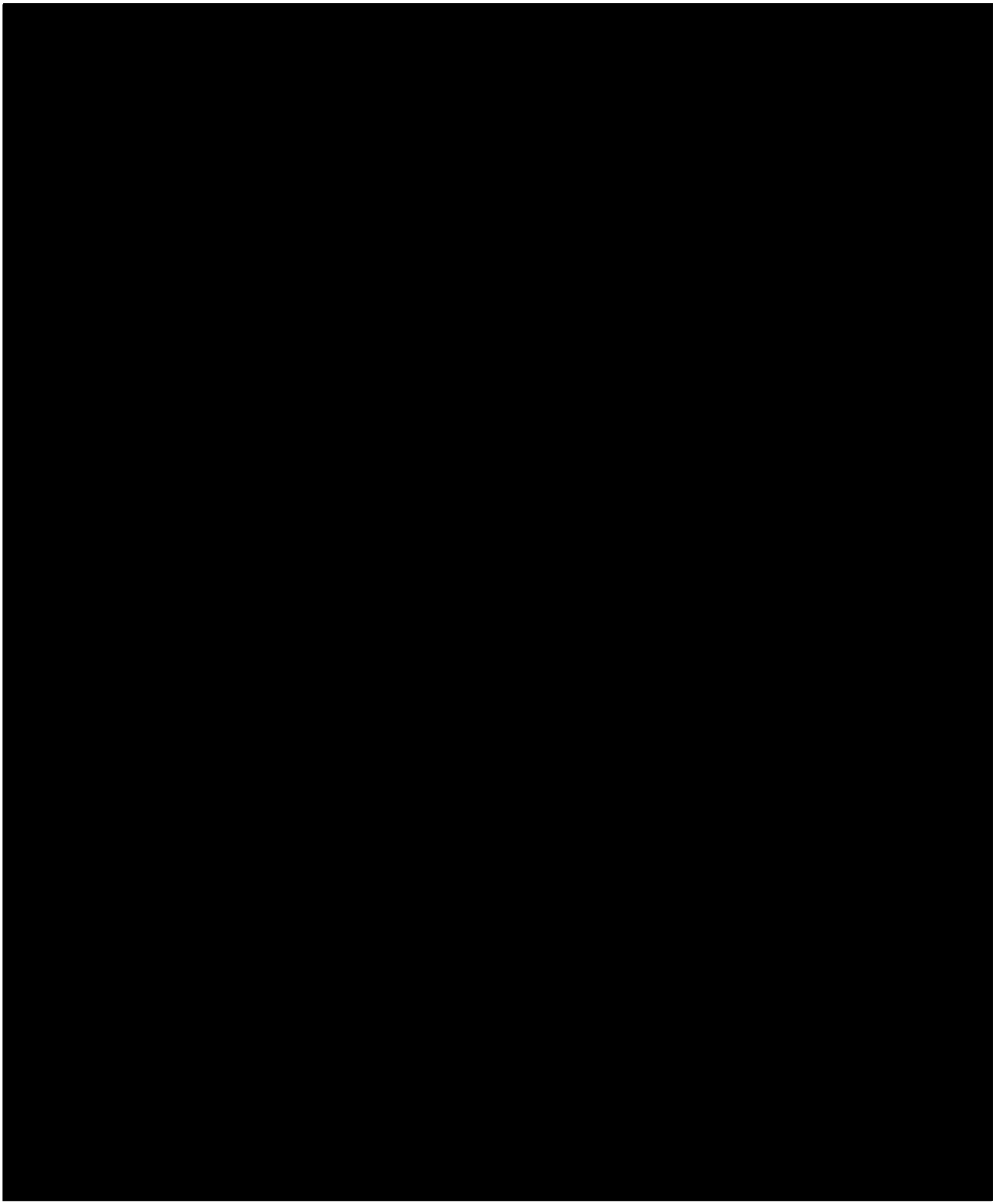
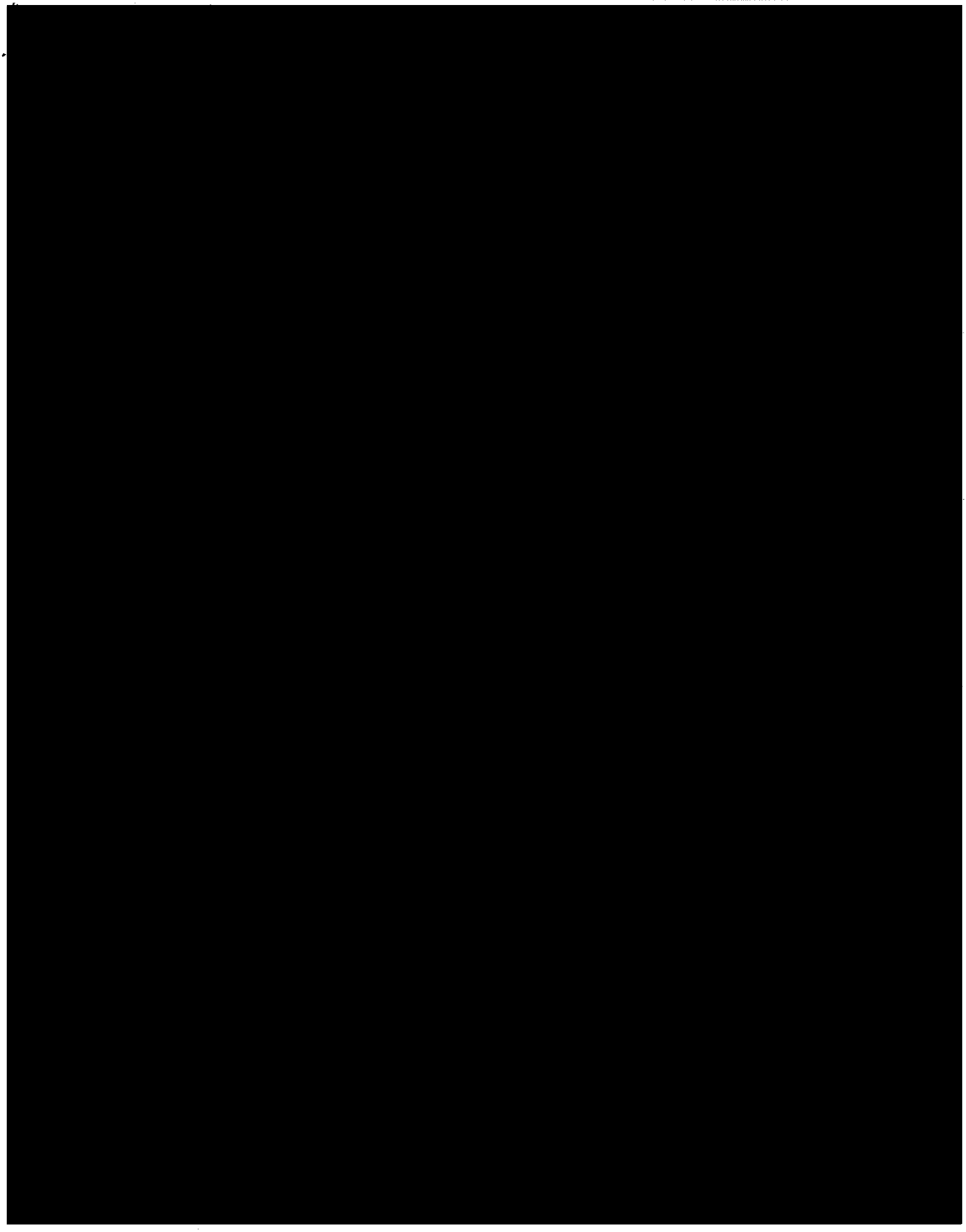
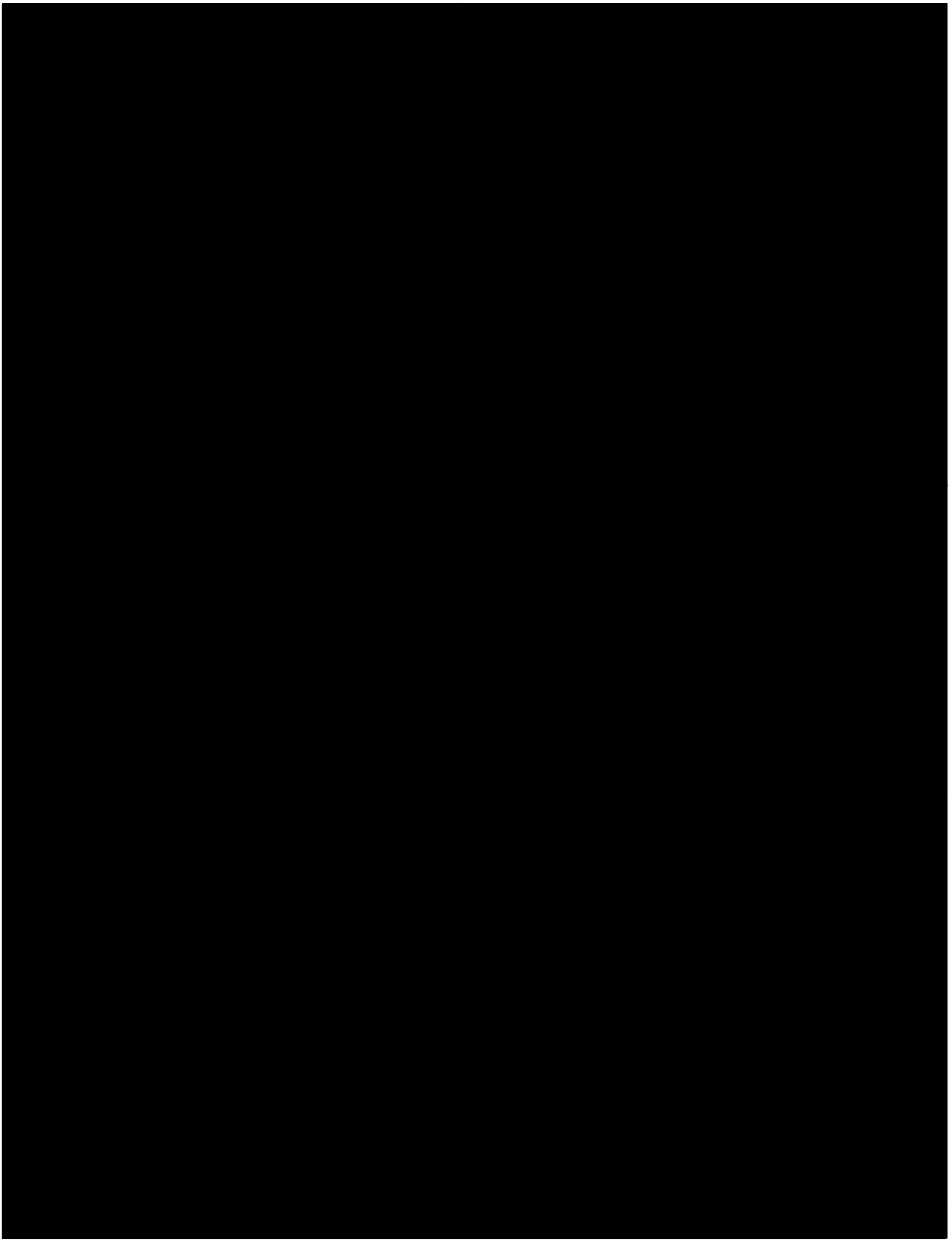
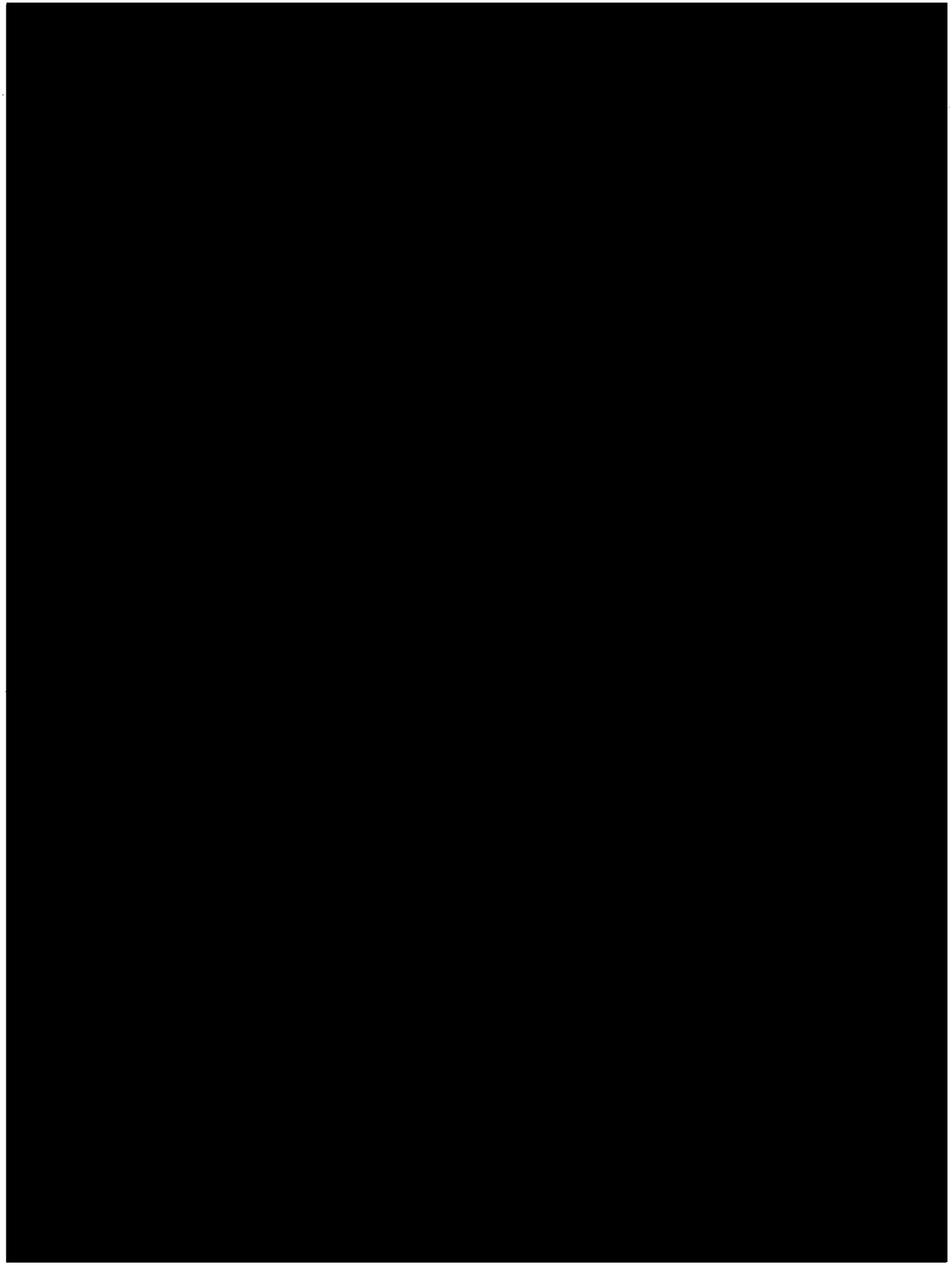
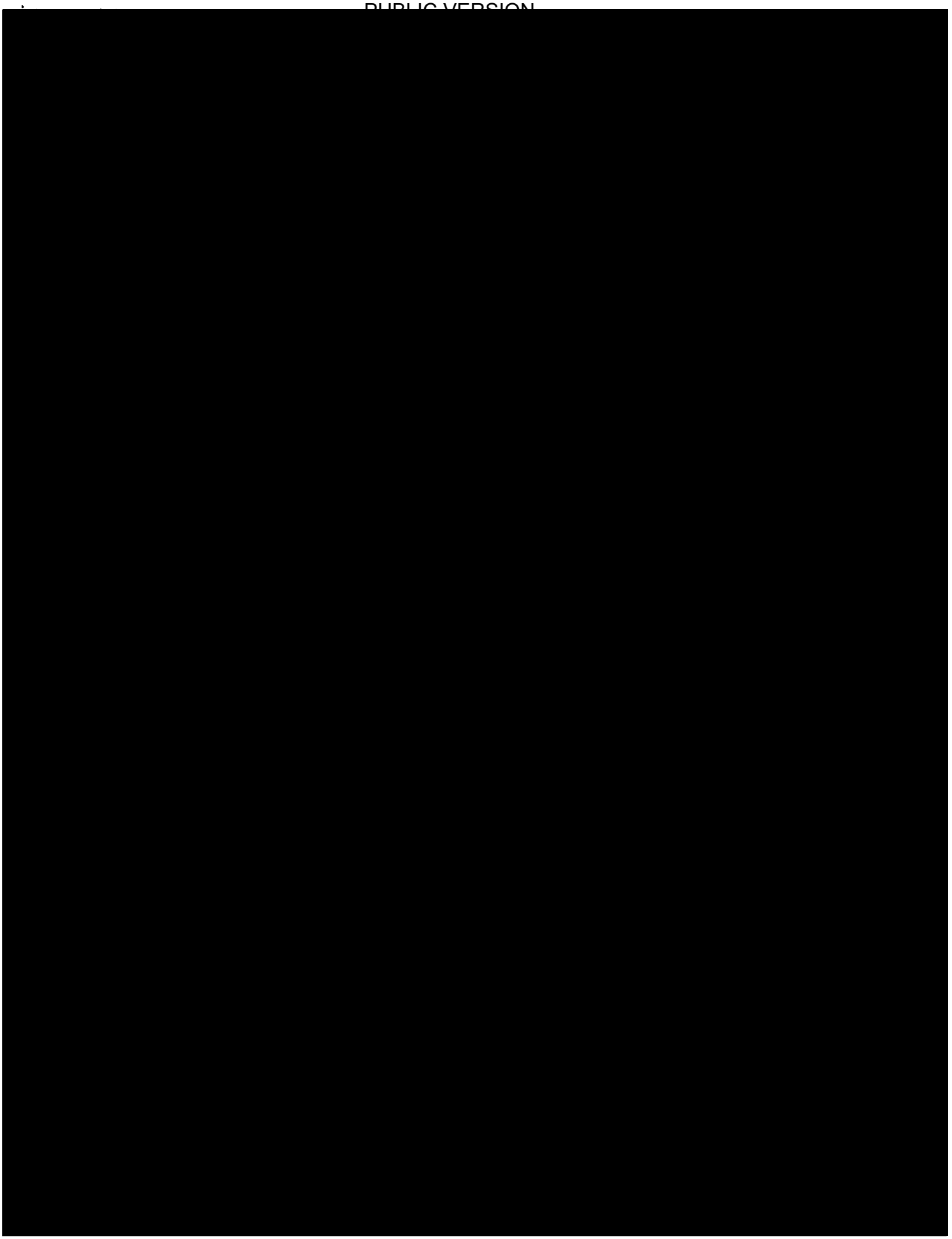


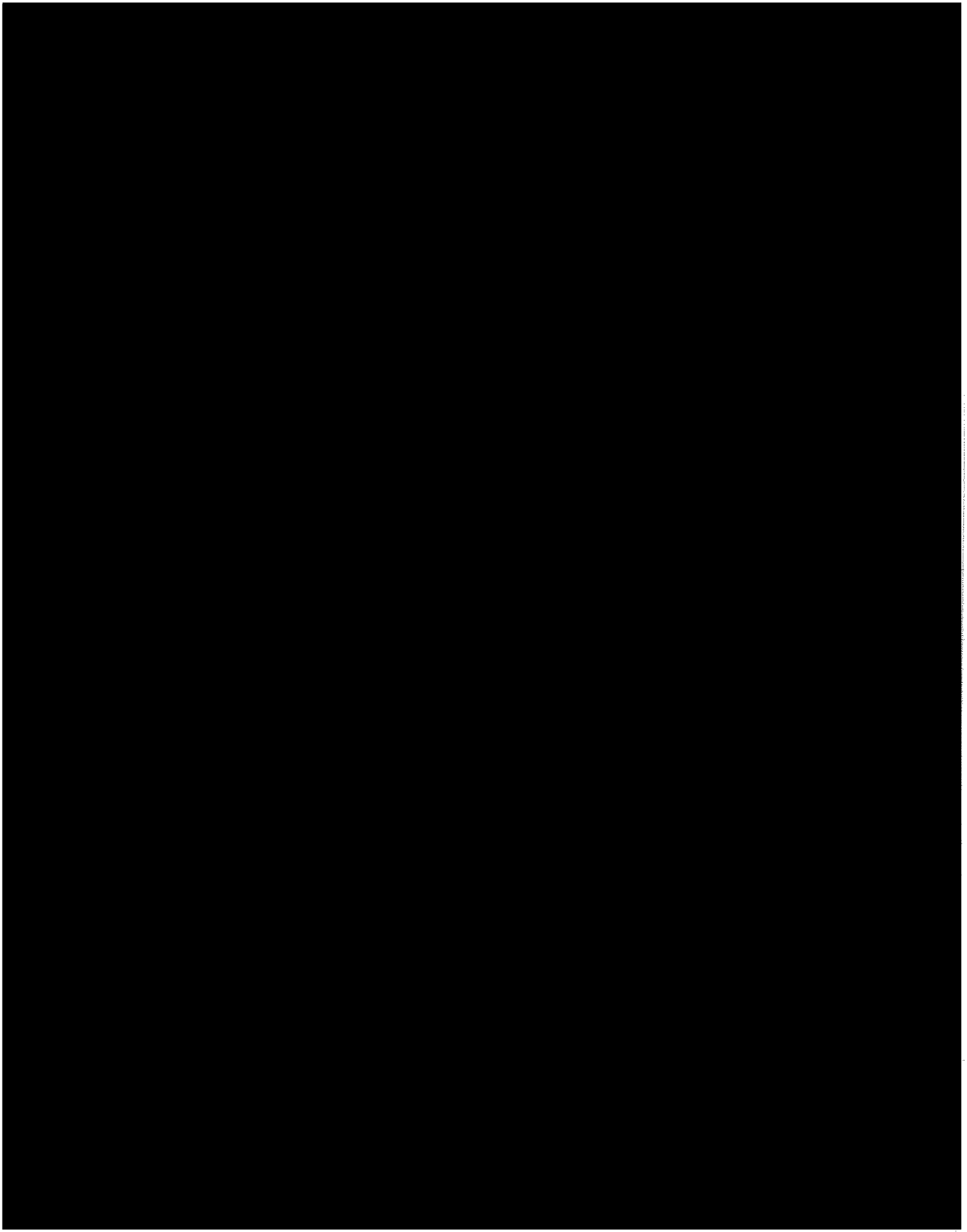
Exhibit 2

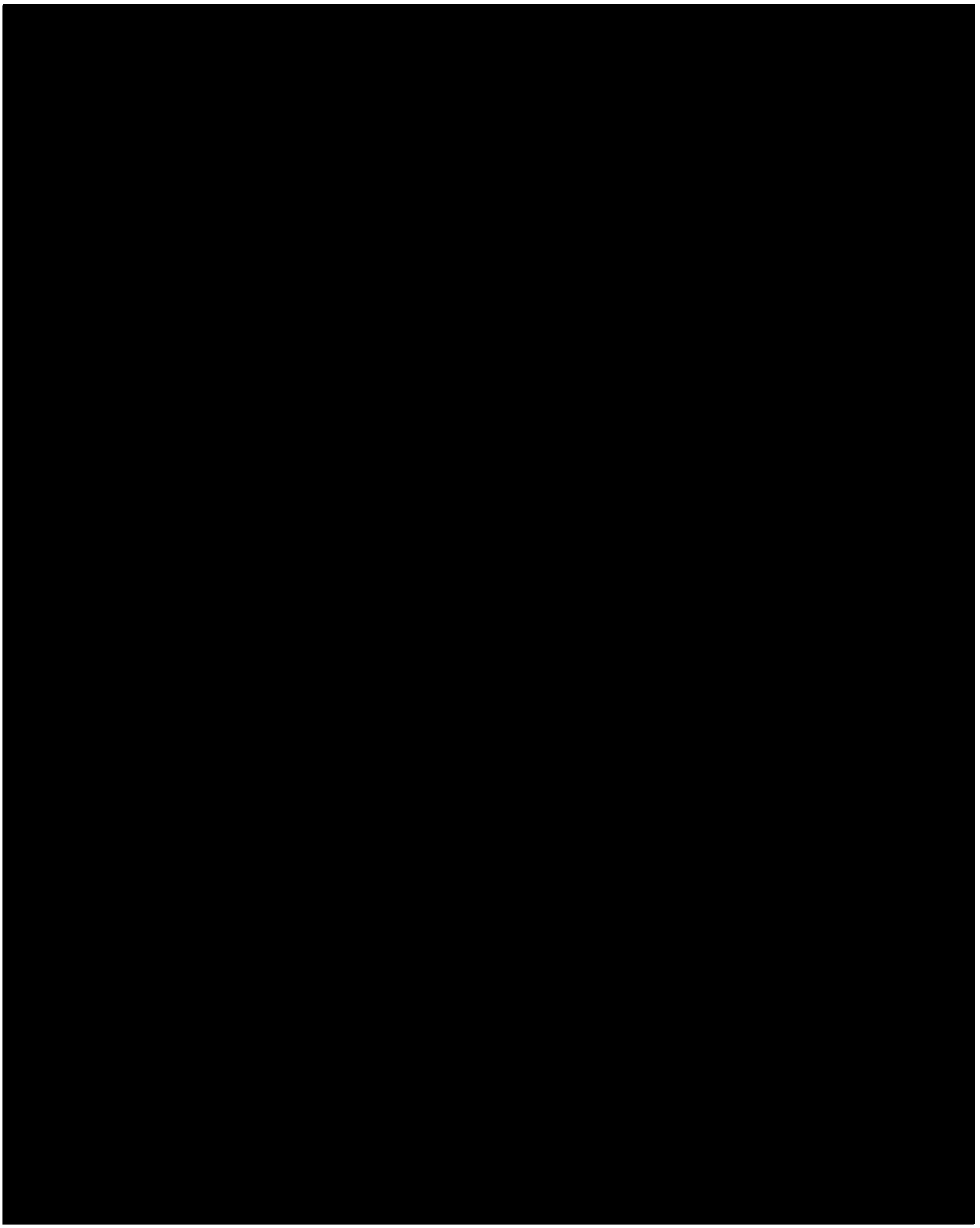


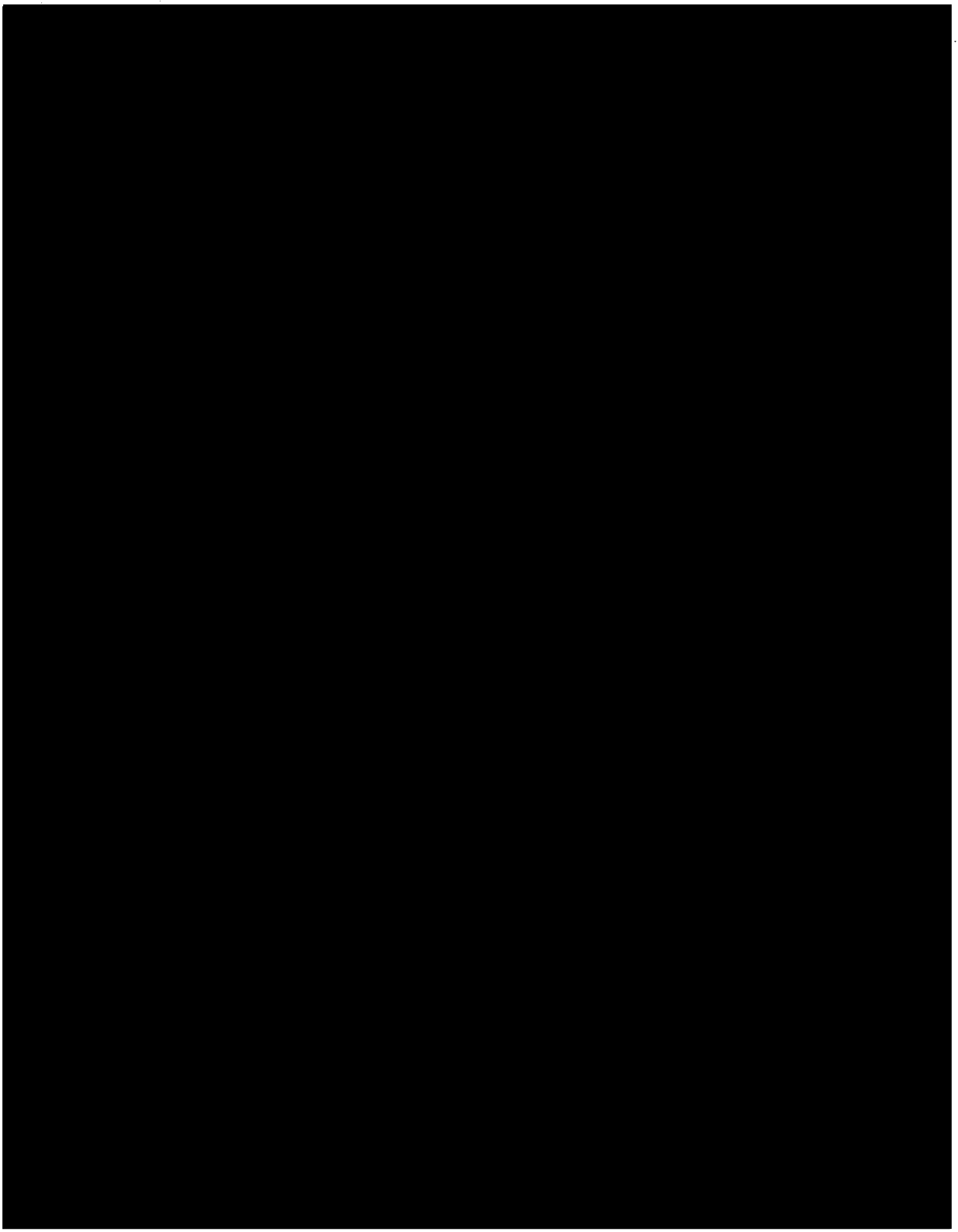








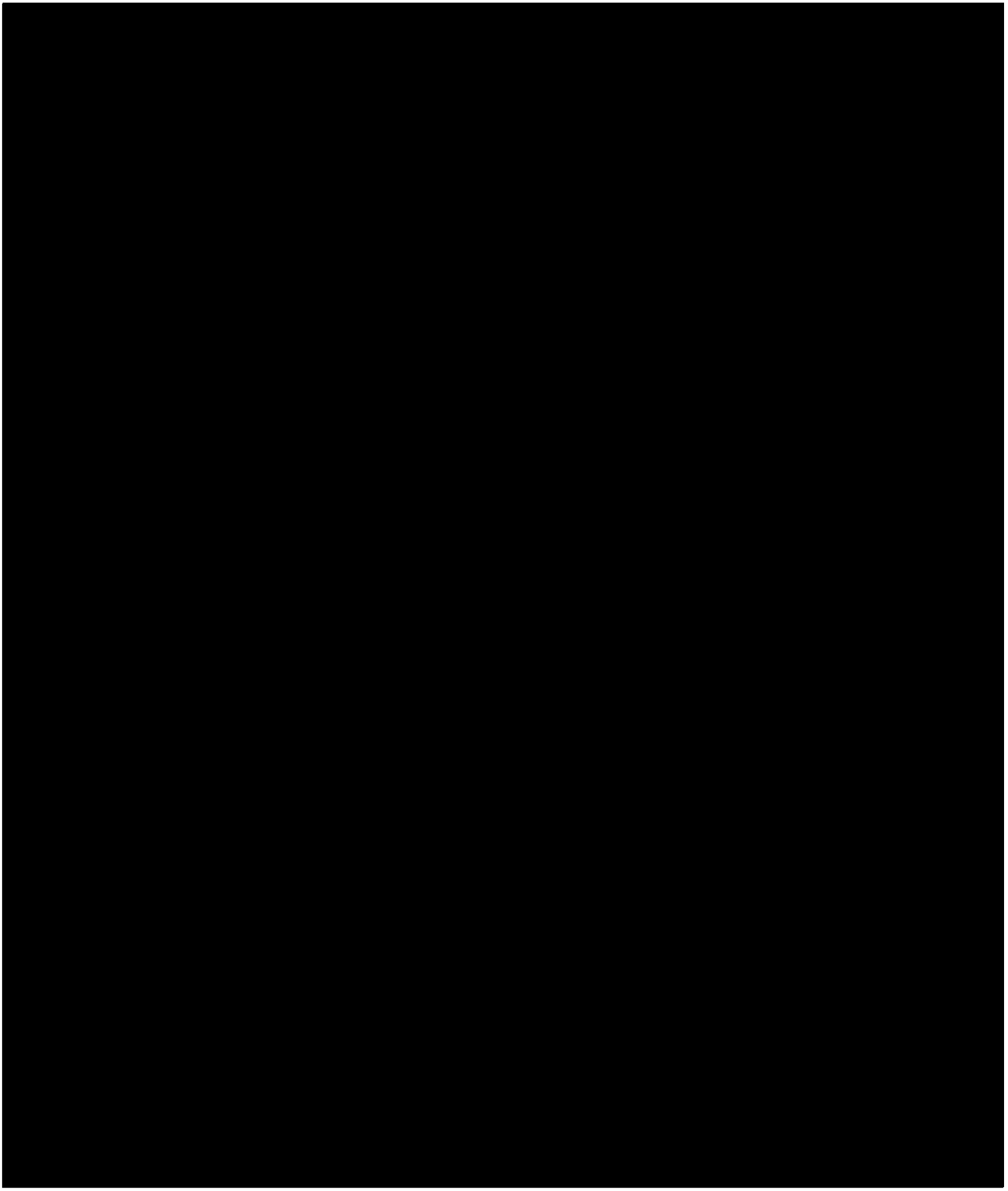




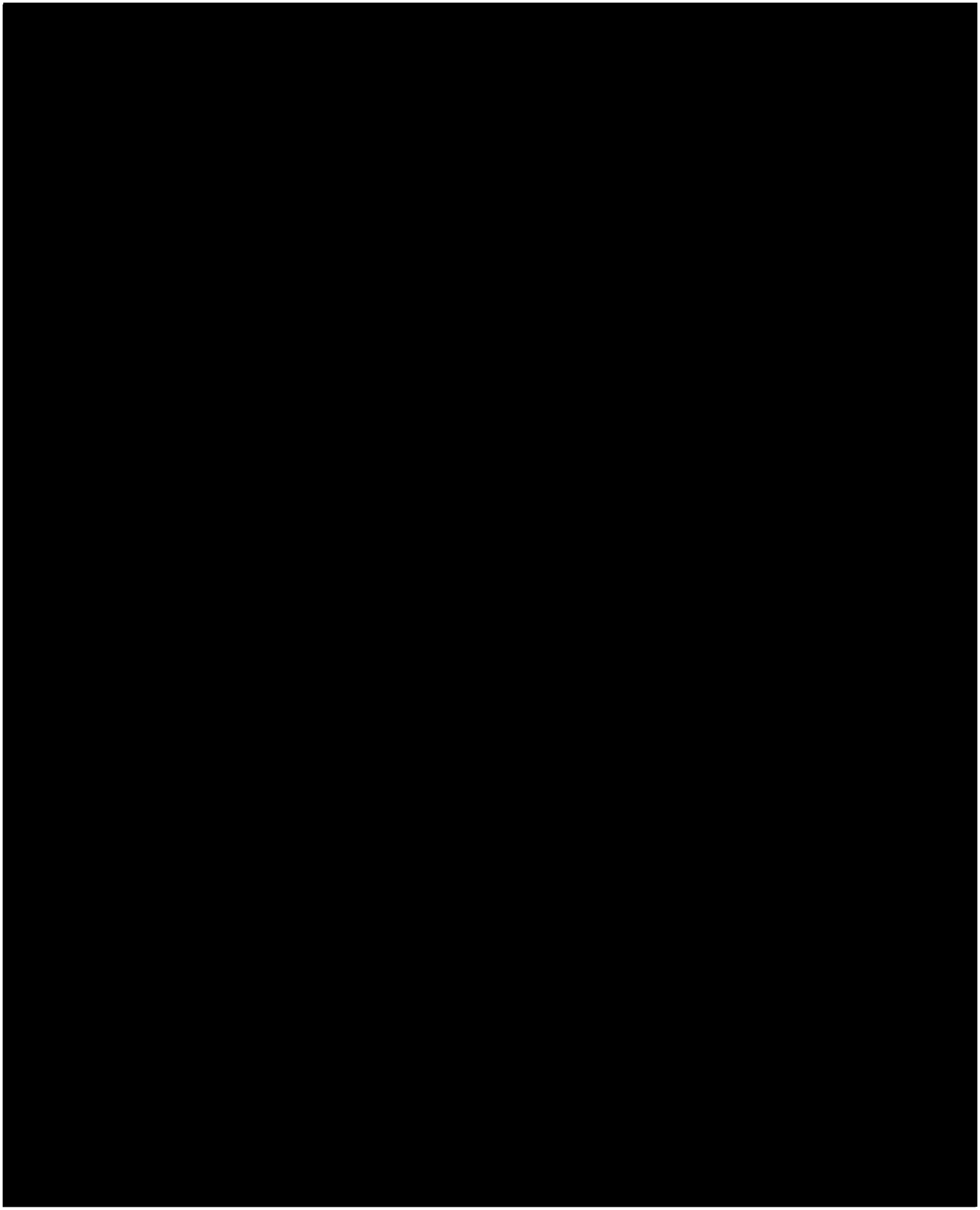
[redacted]

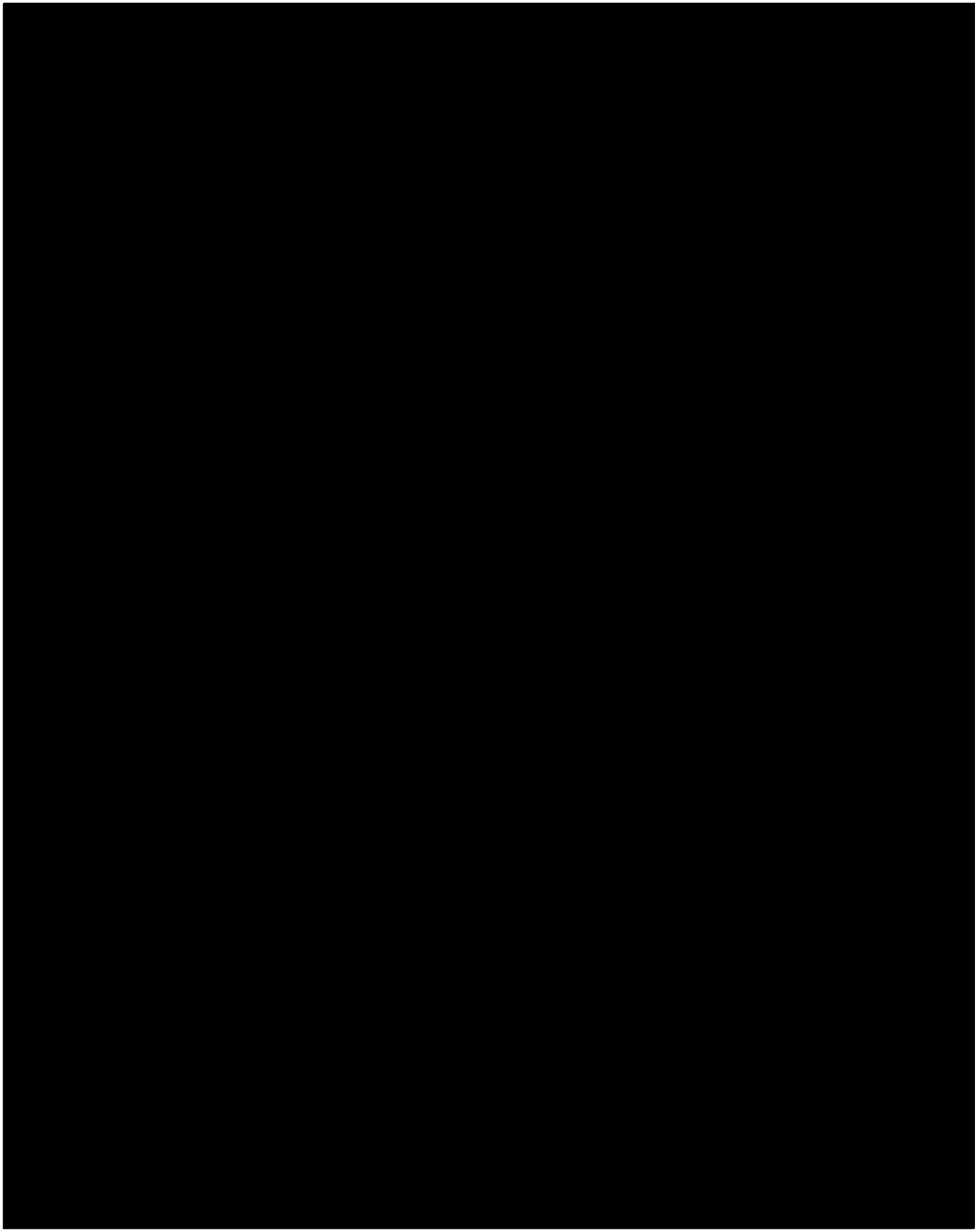
[redacted]

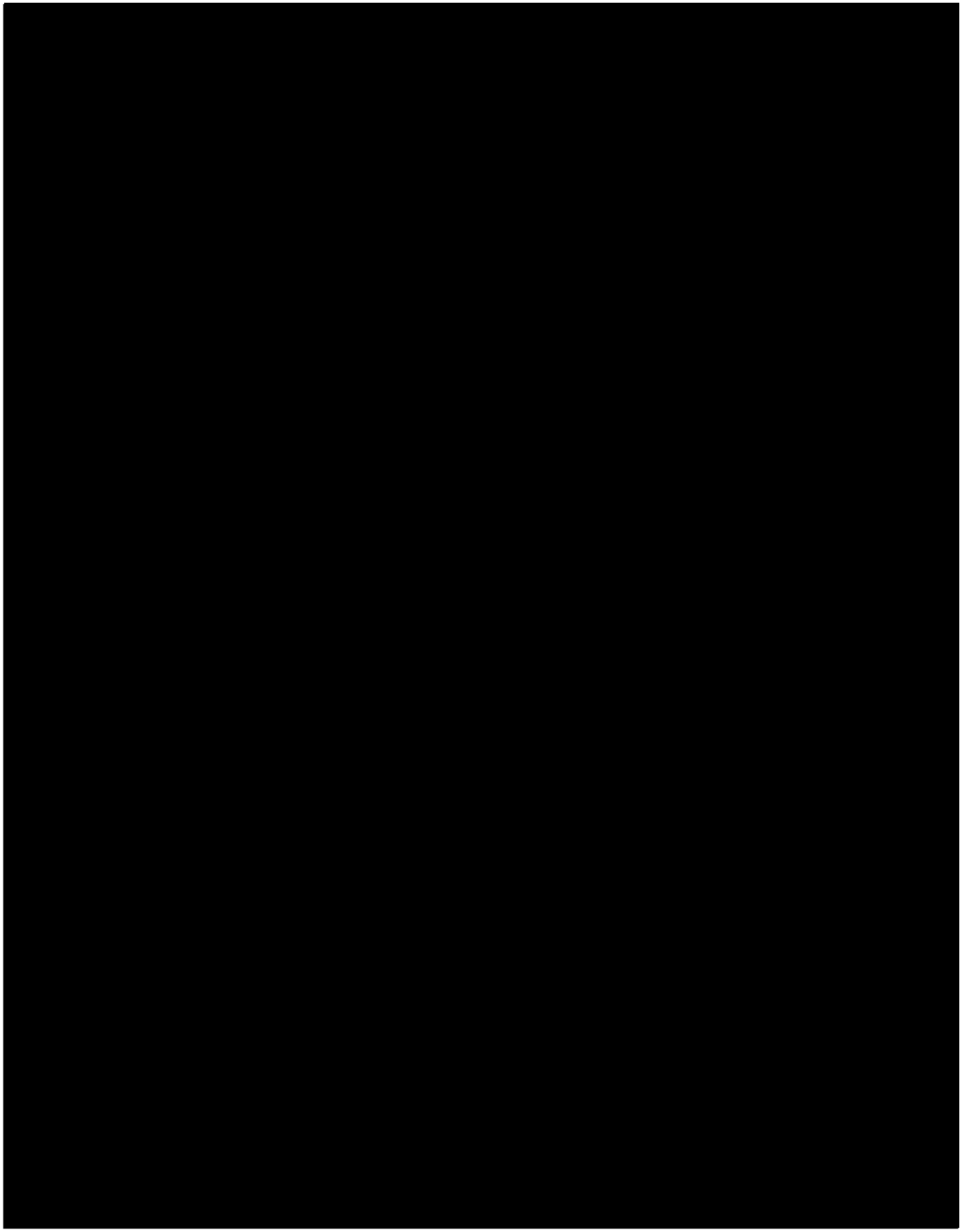
Exhibit 3

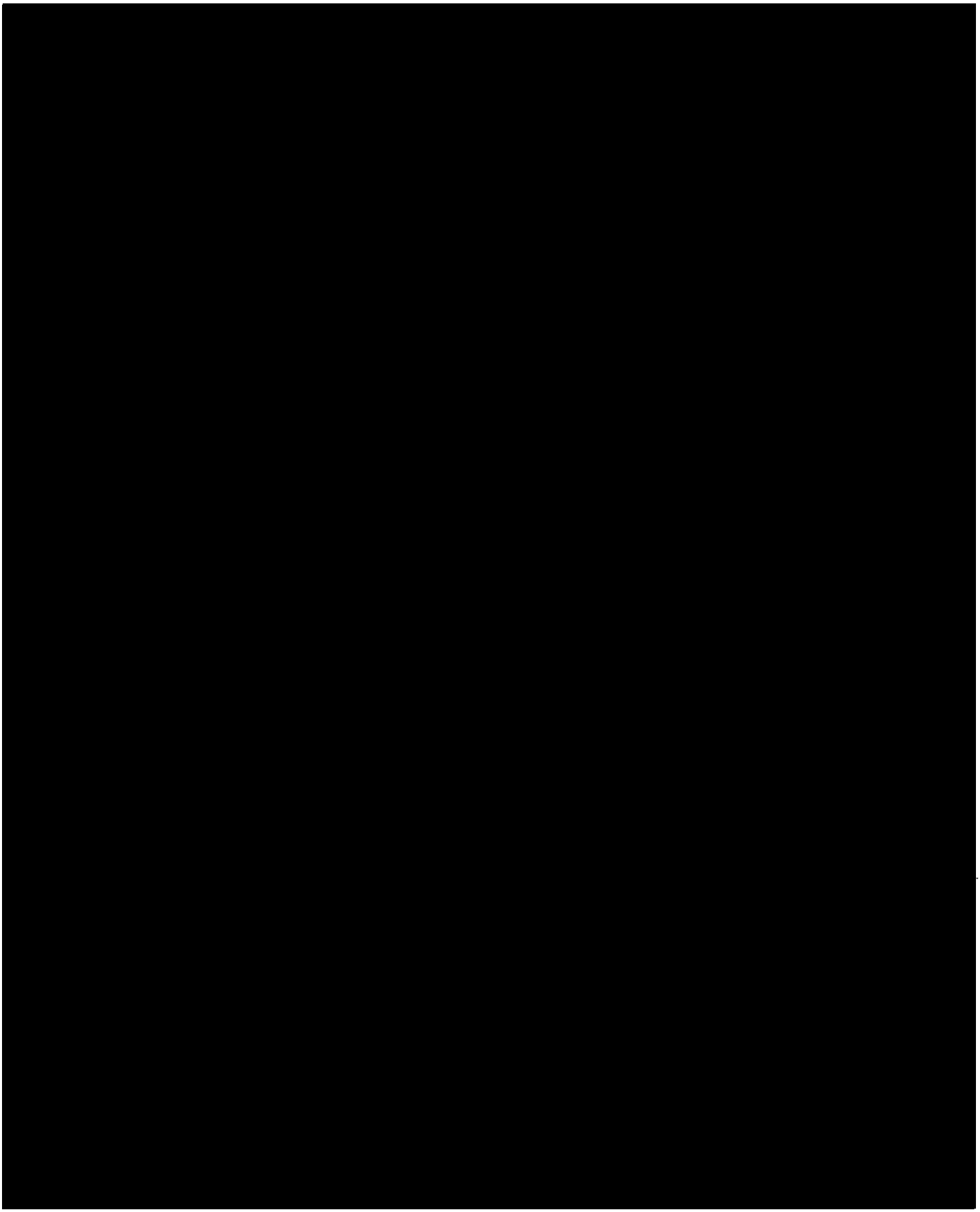


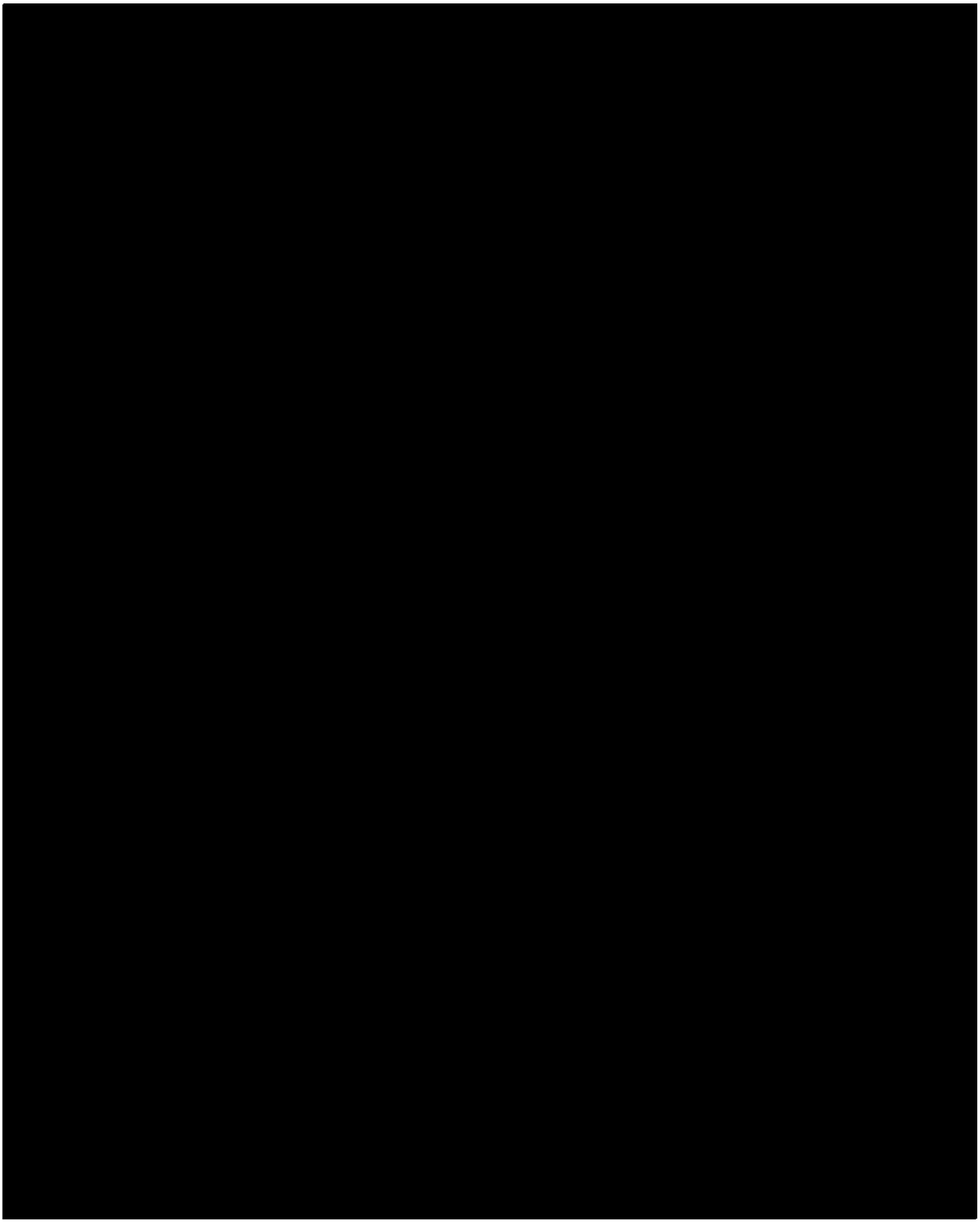
[redacted]

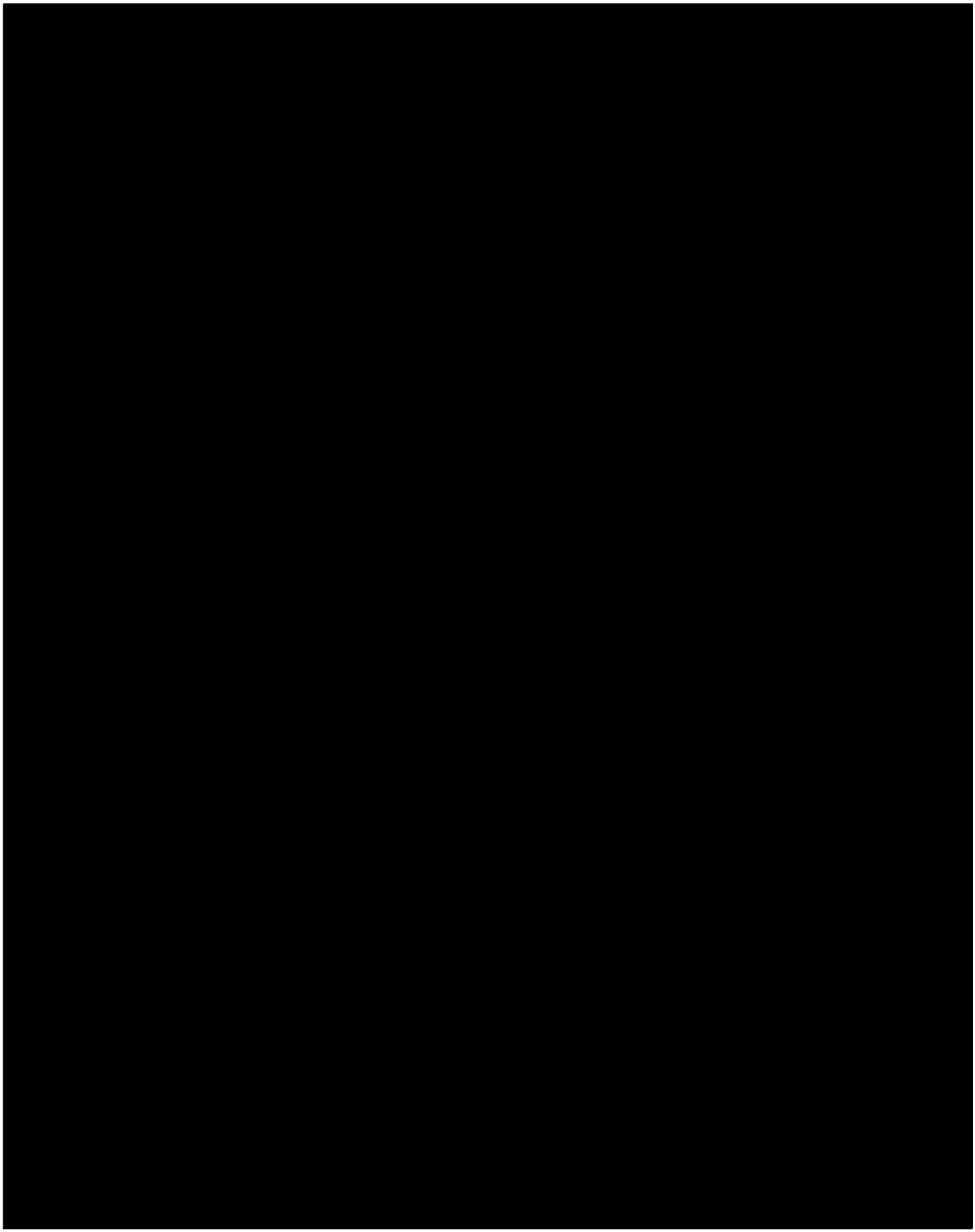


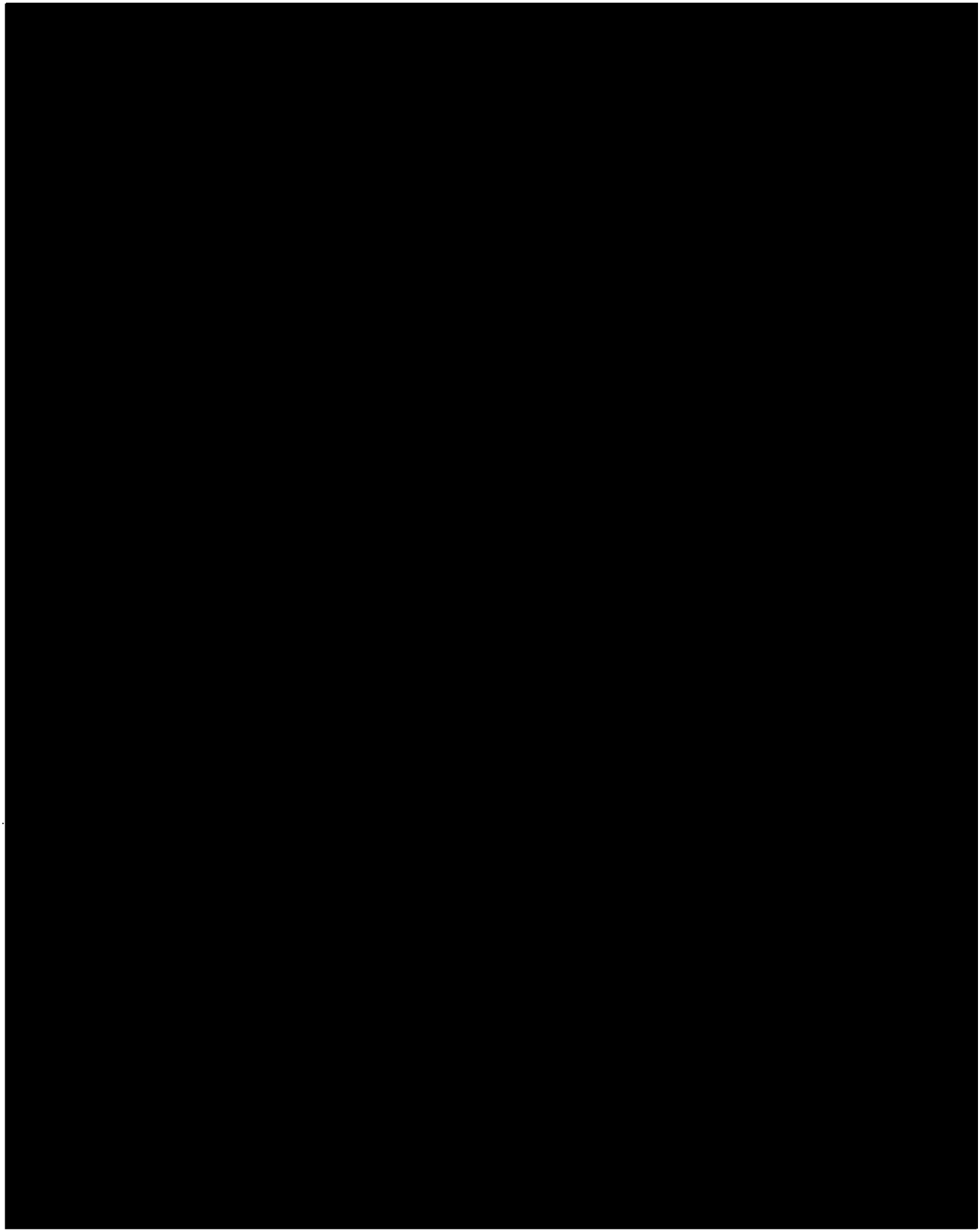


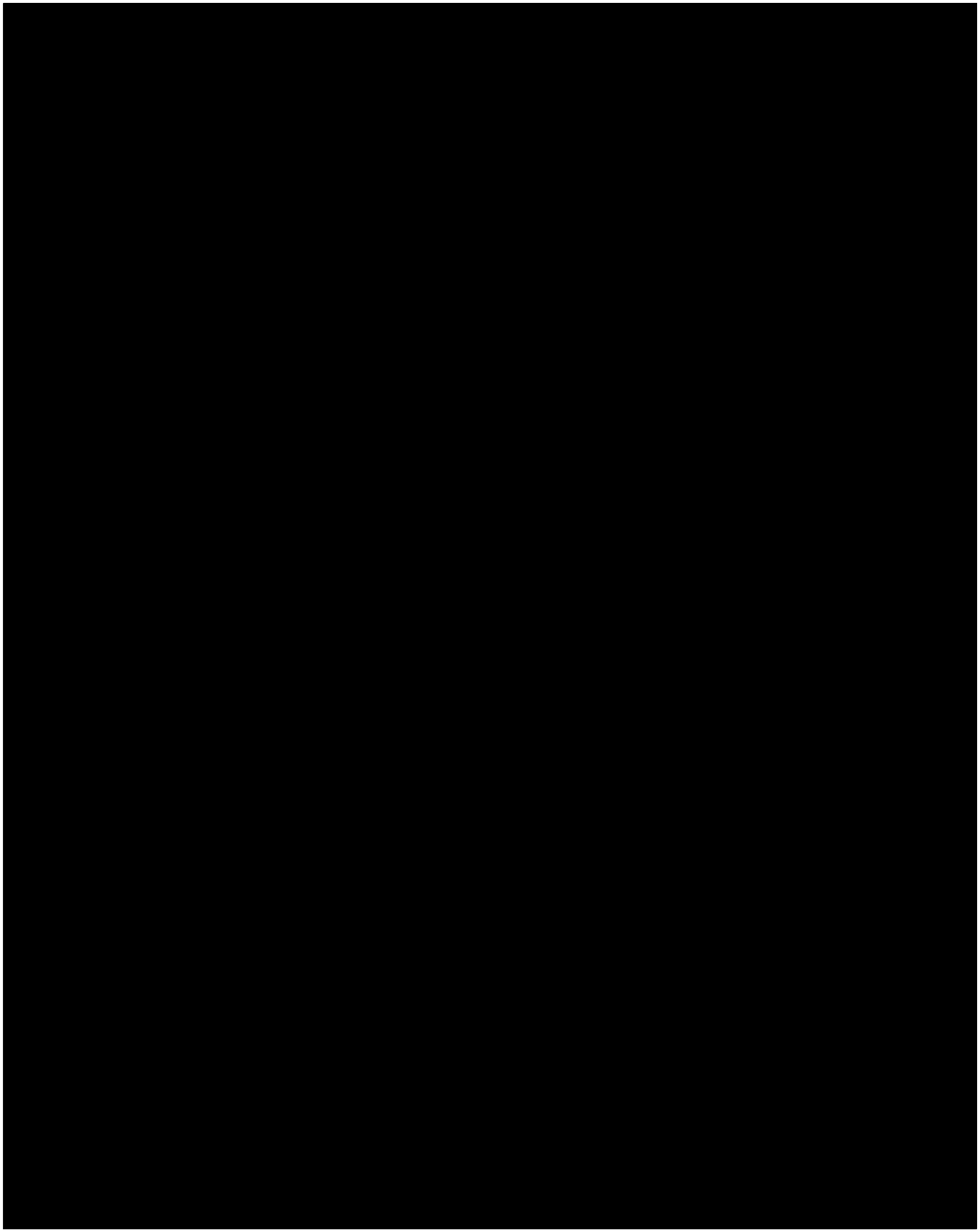


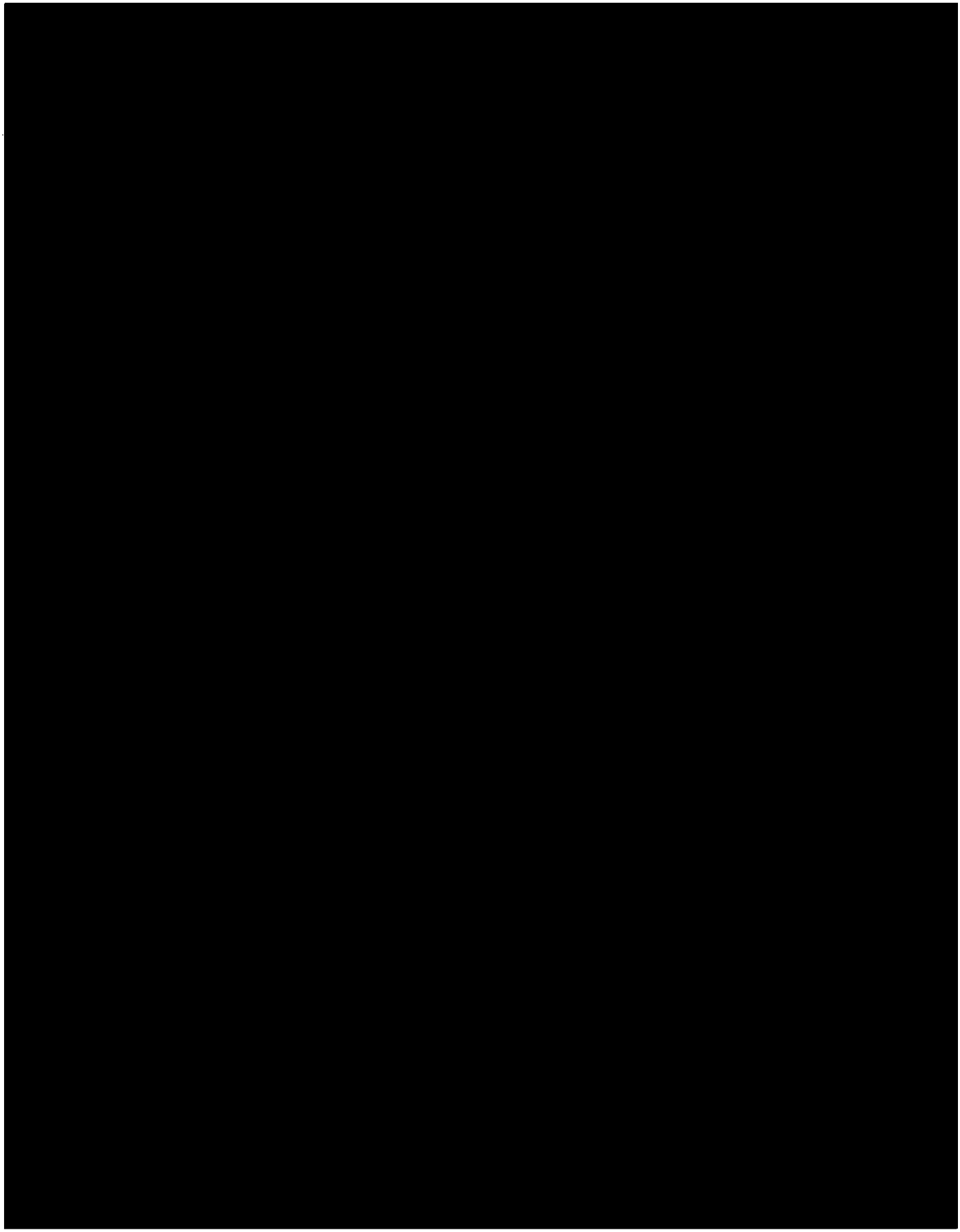


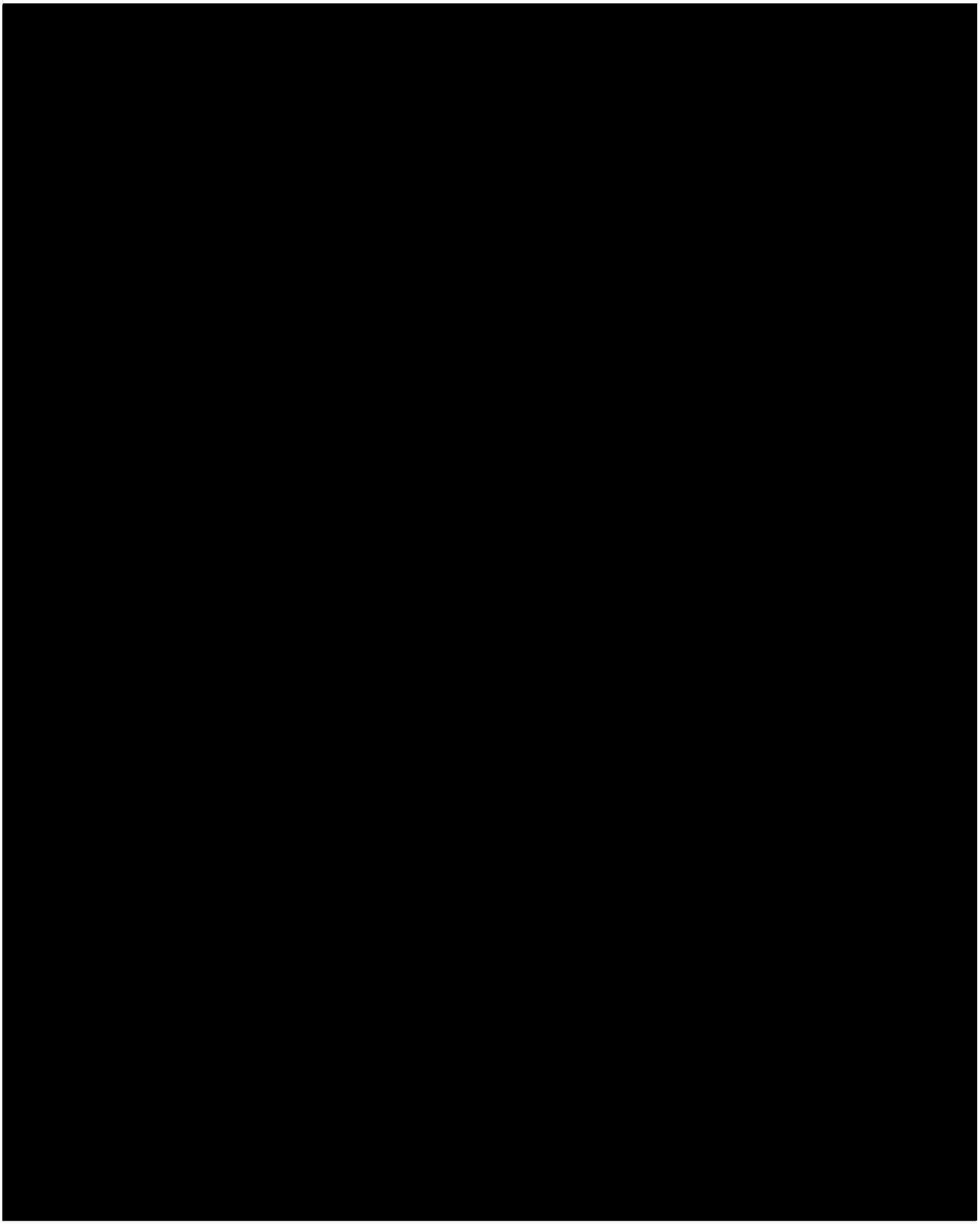


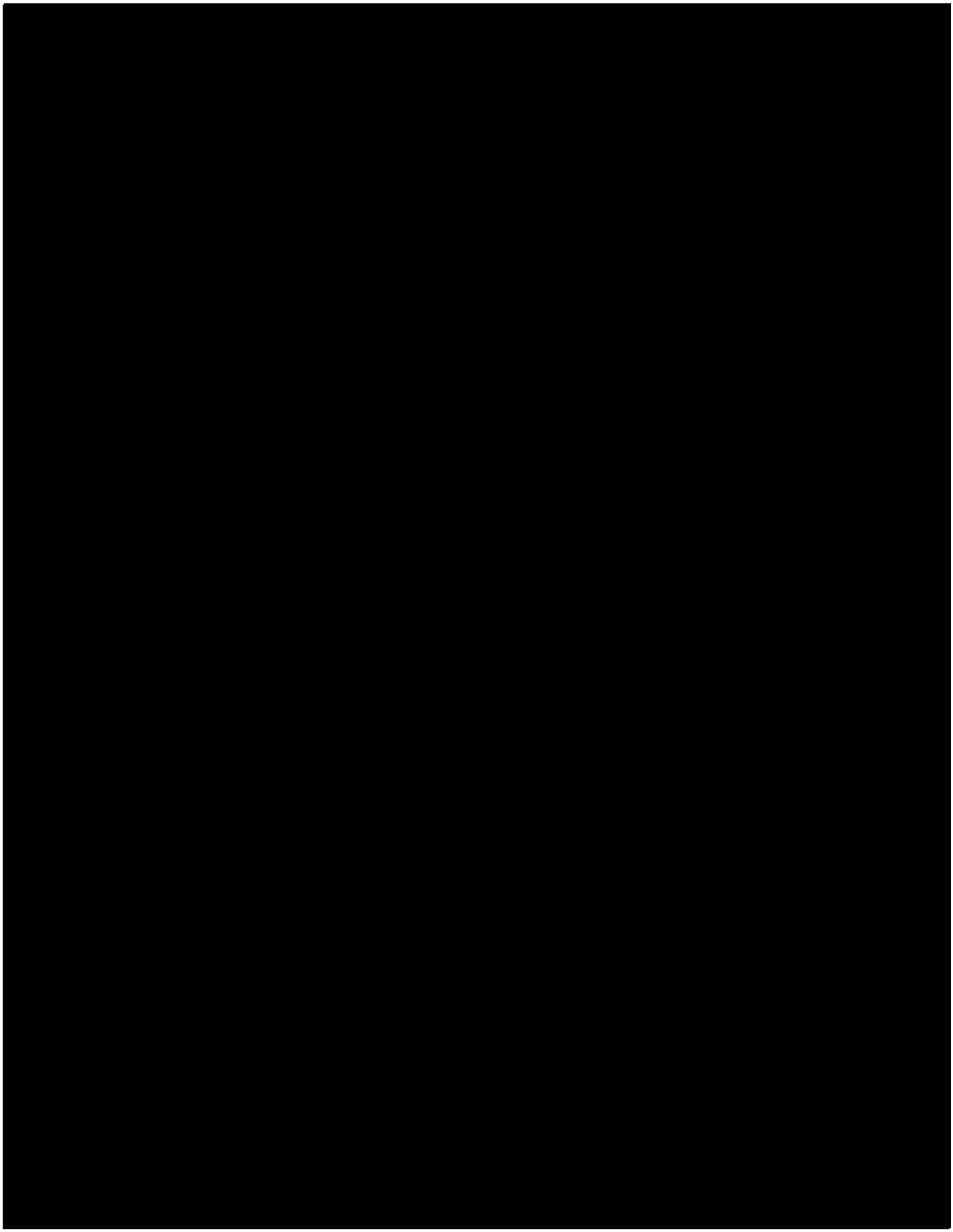


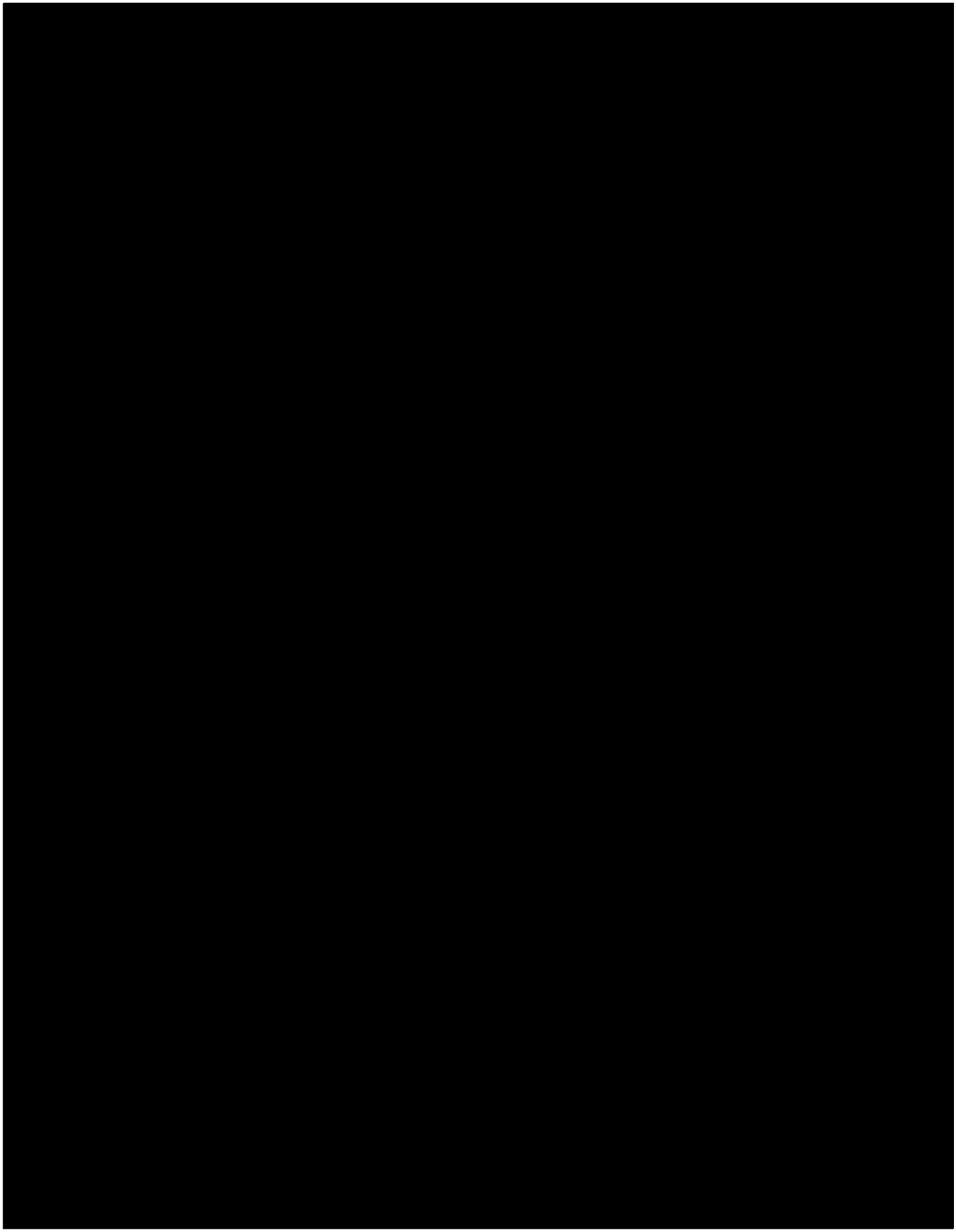


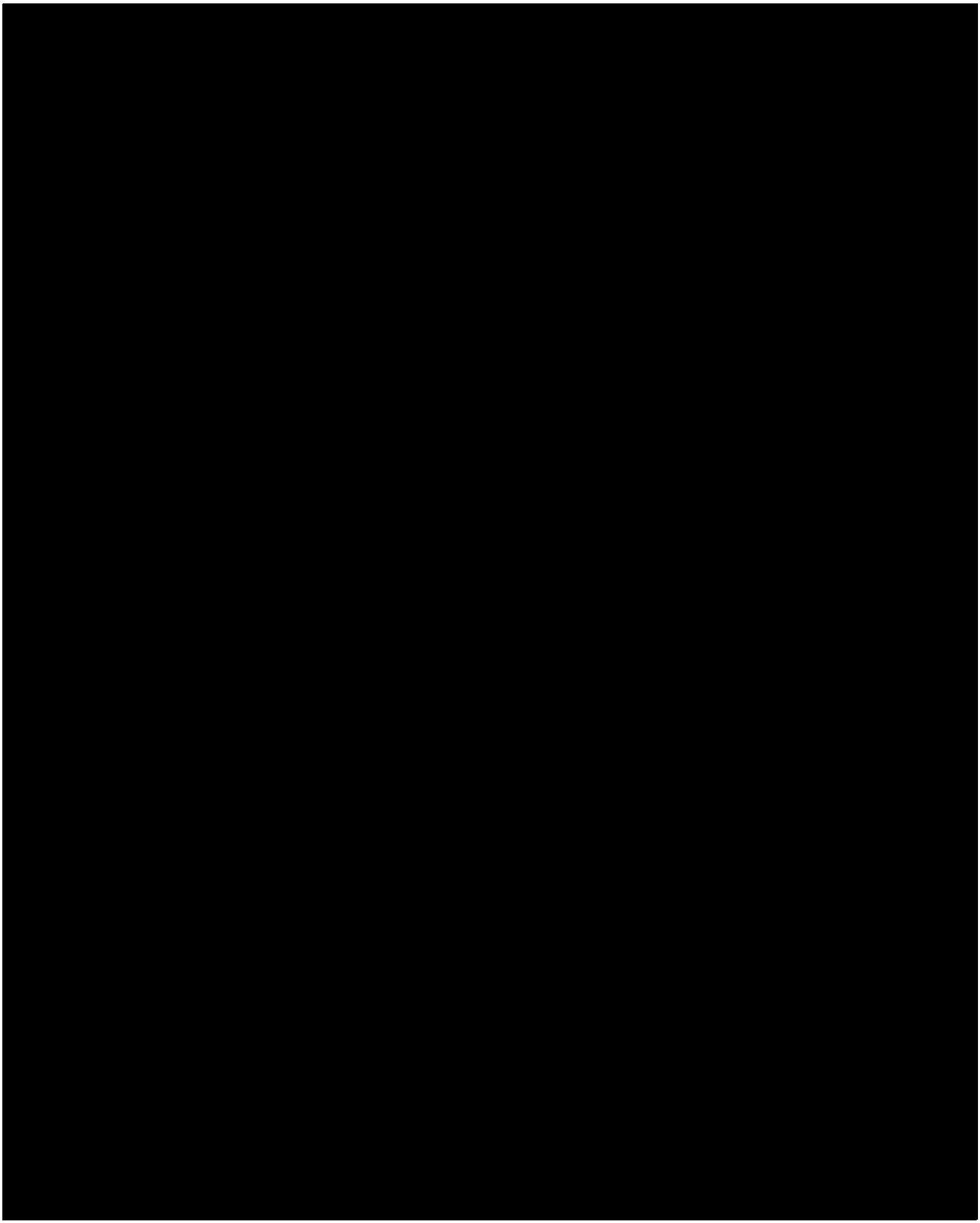


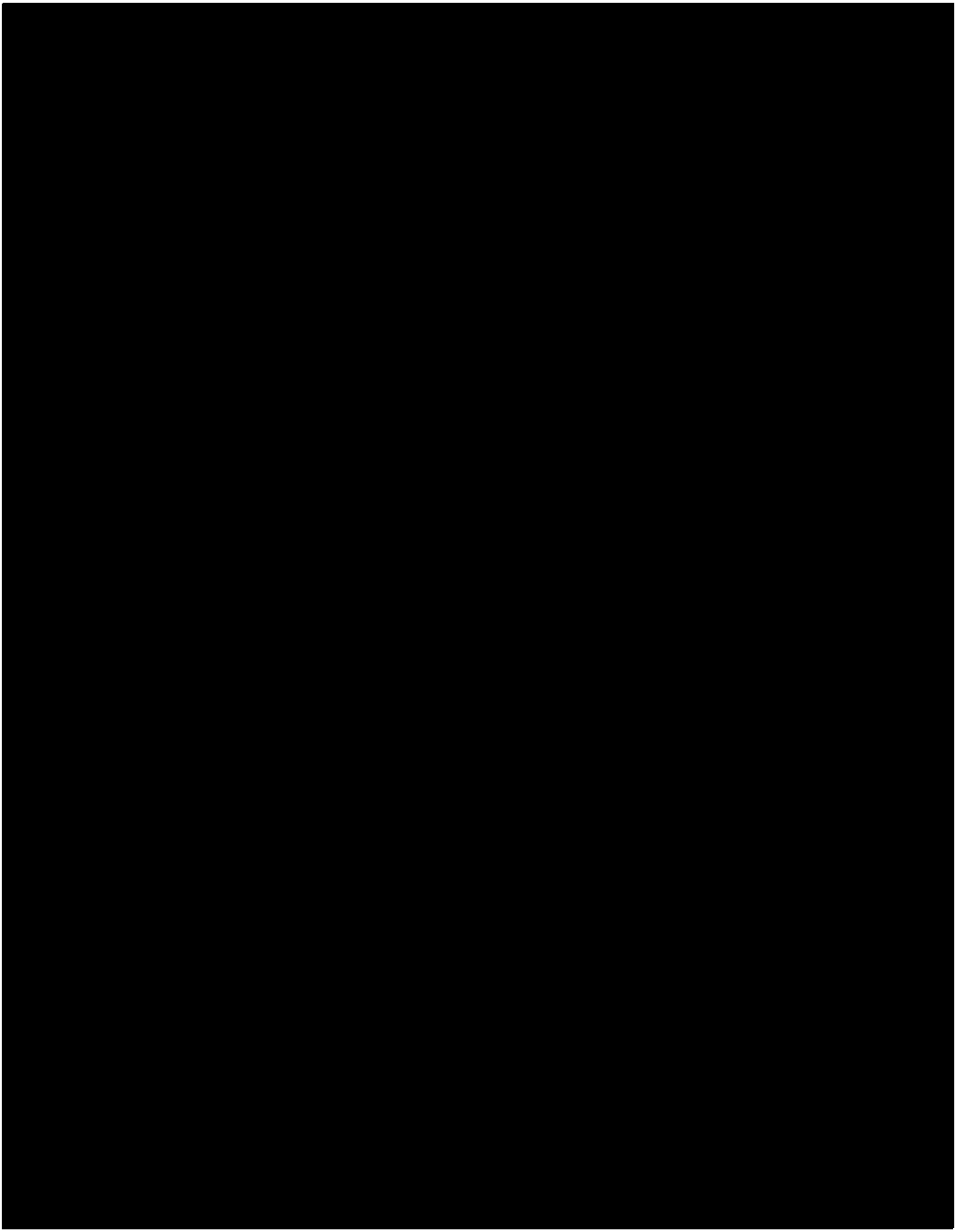


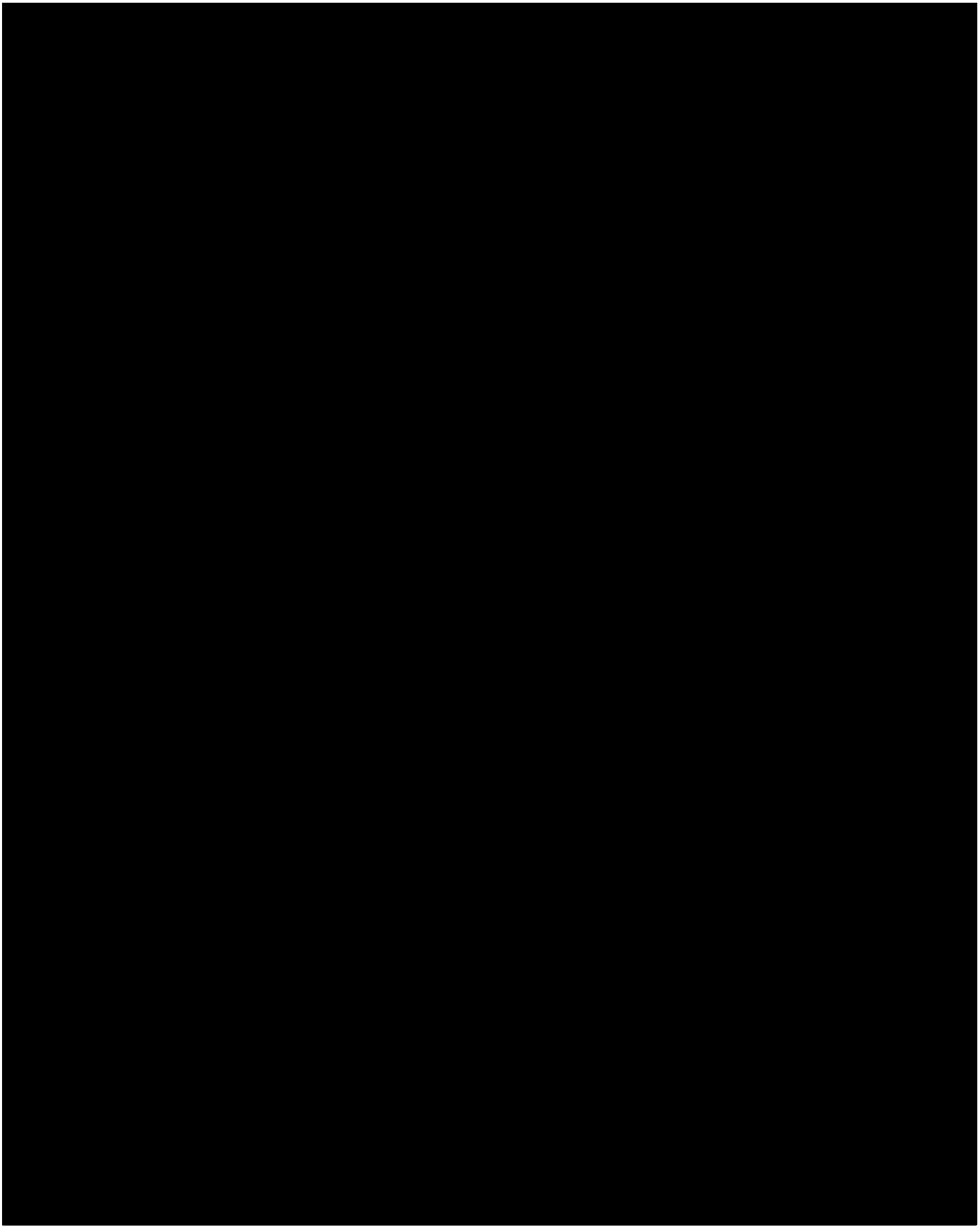


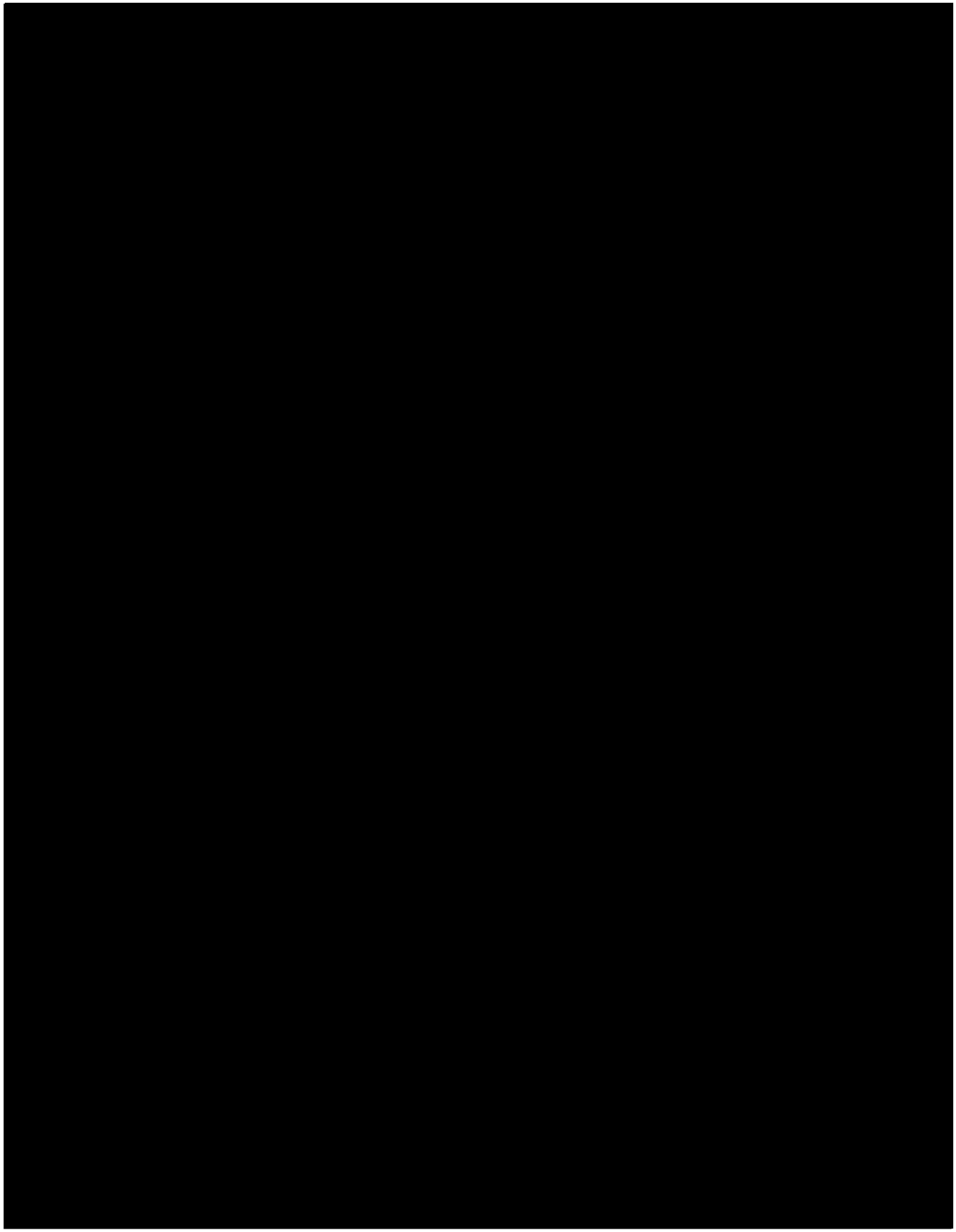


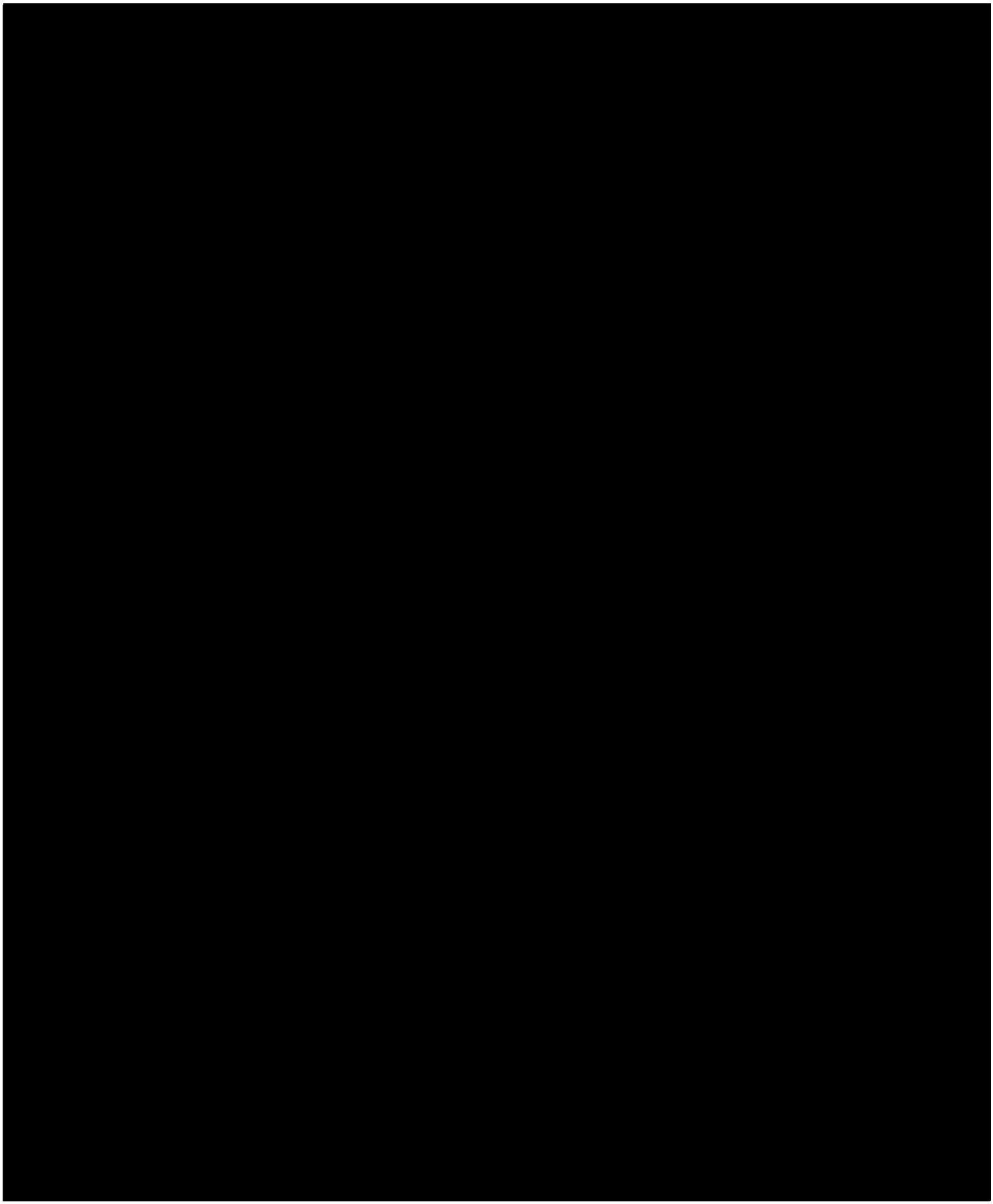


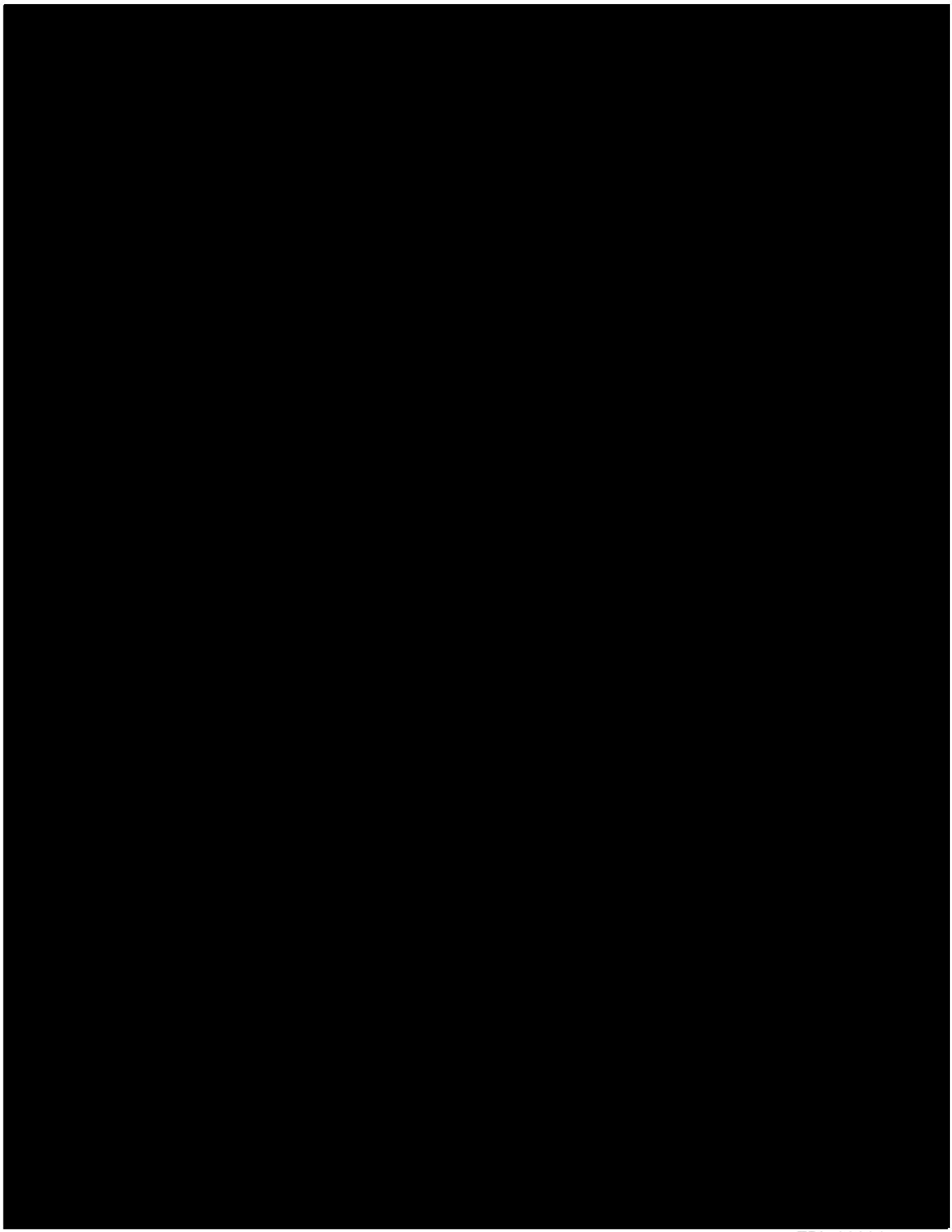


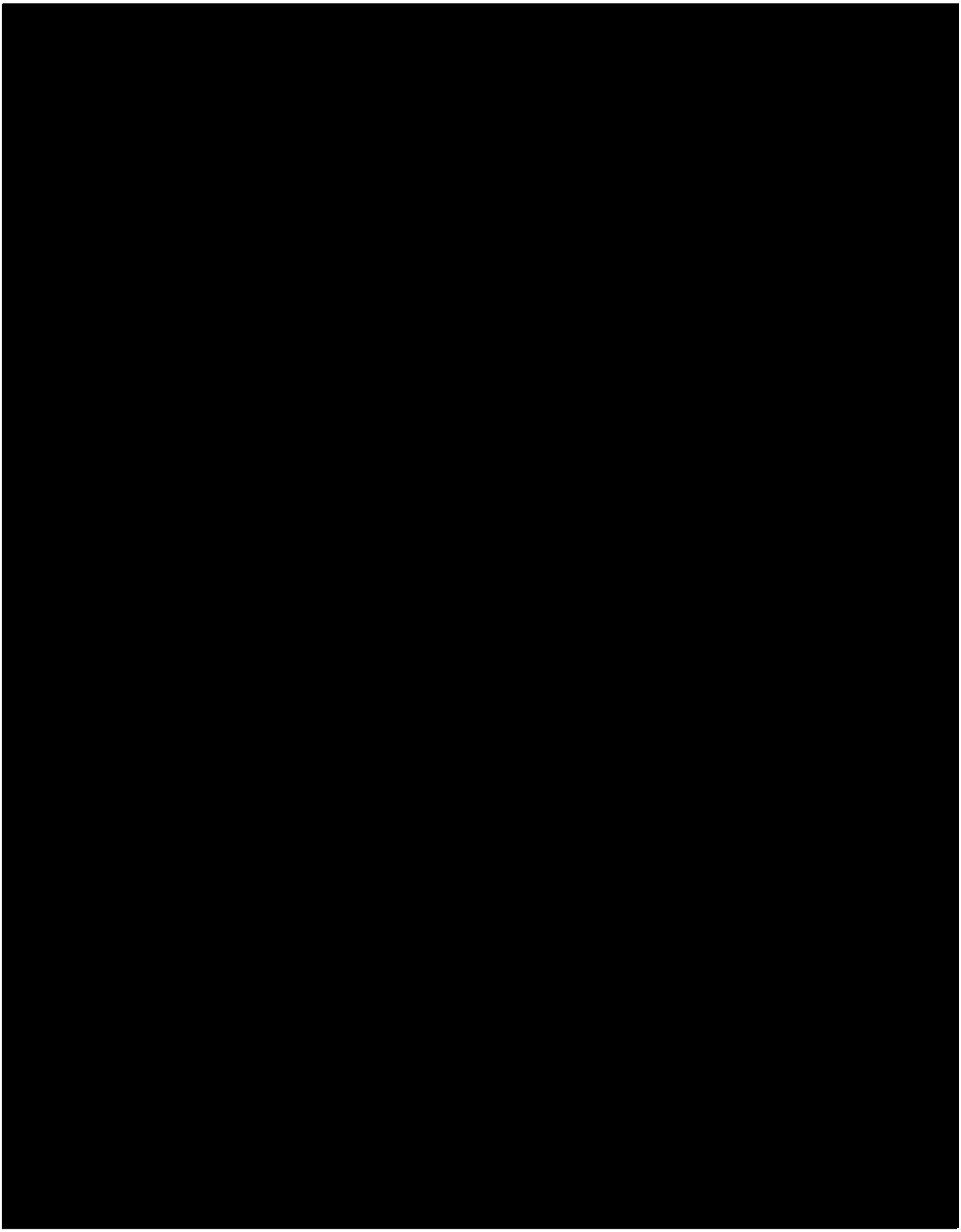




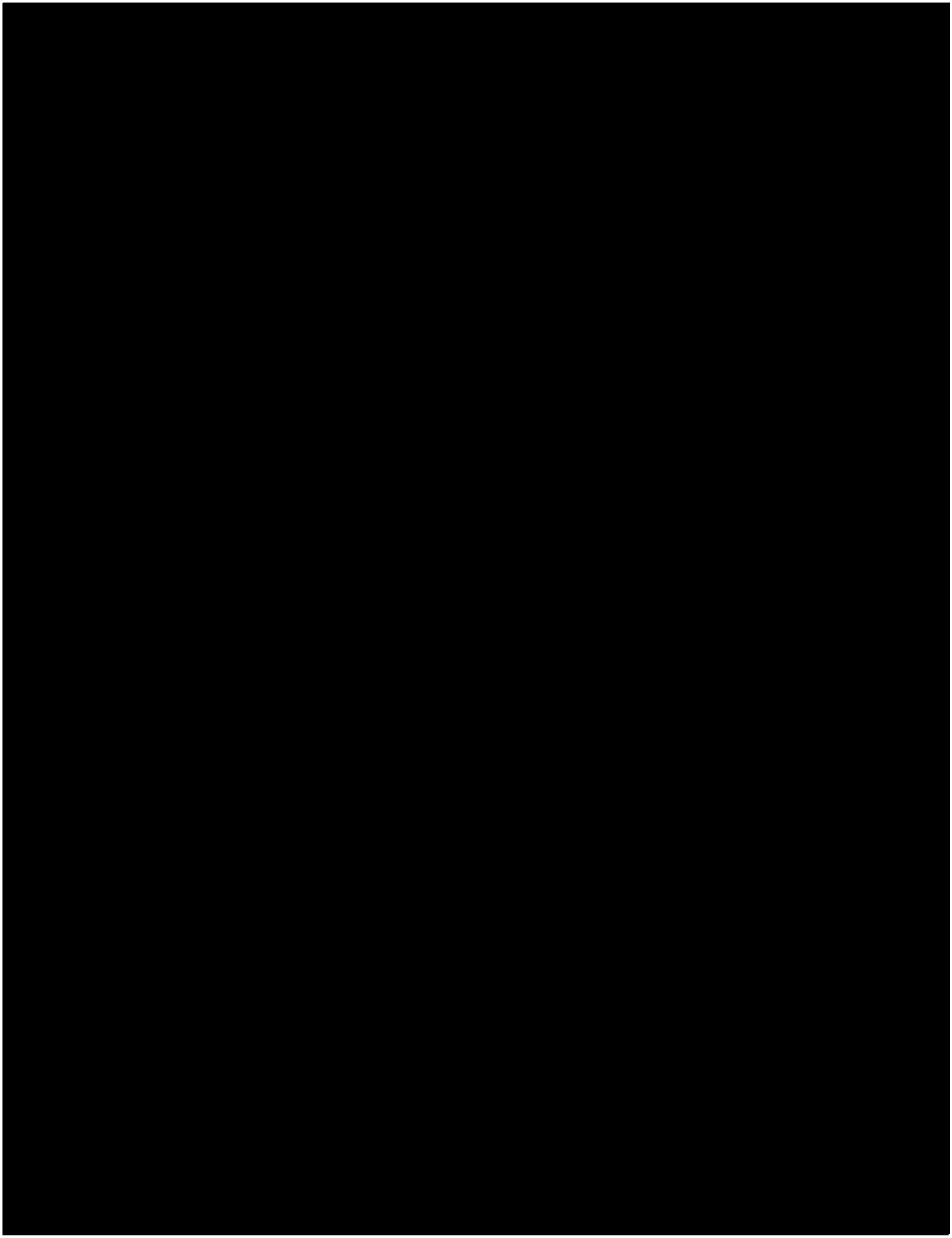








[redacted]



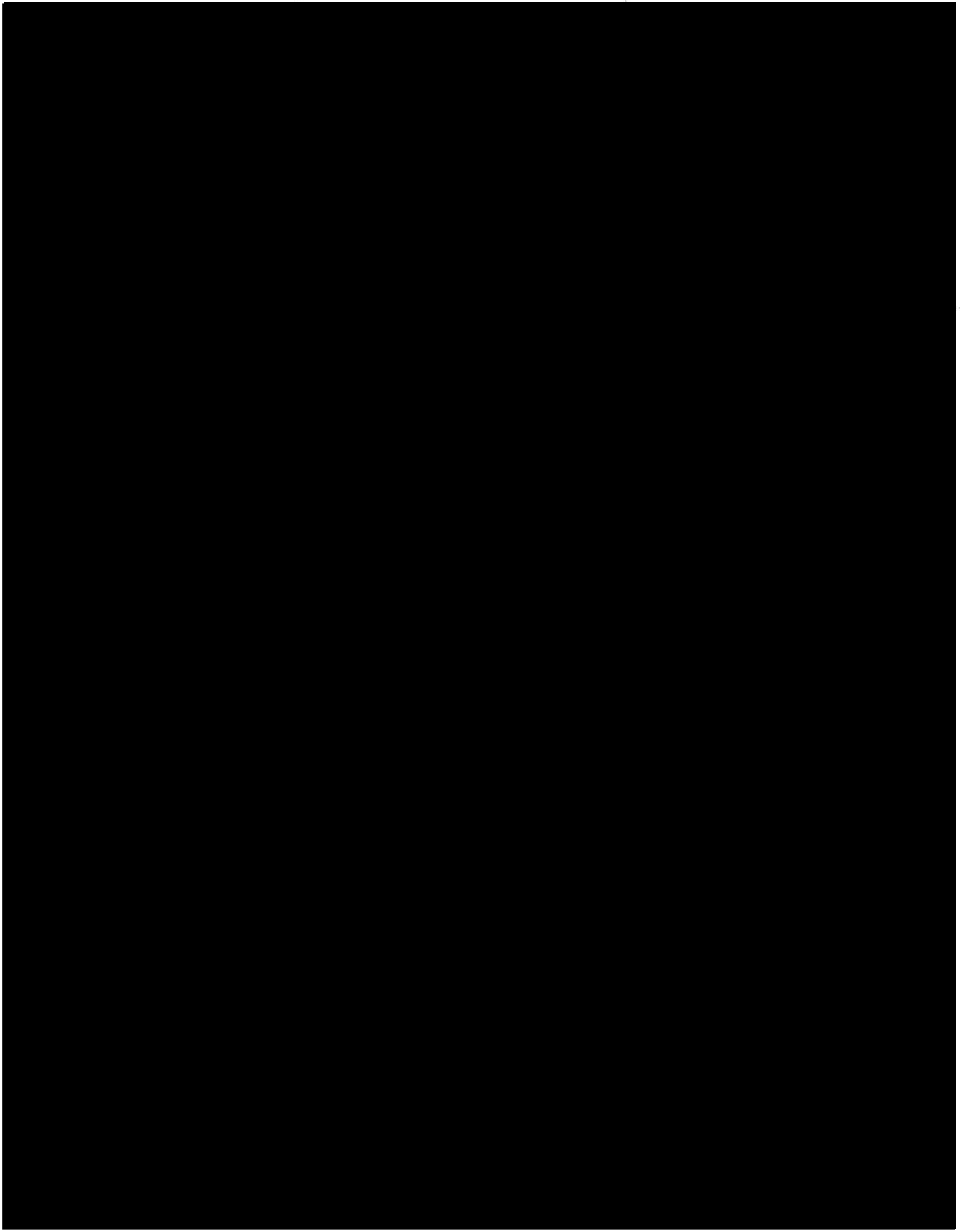
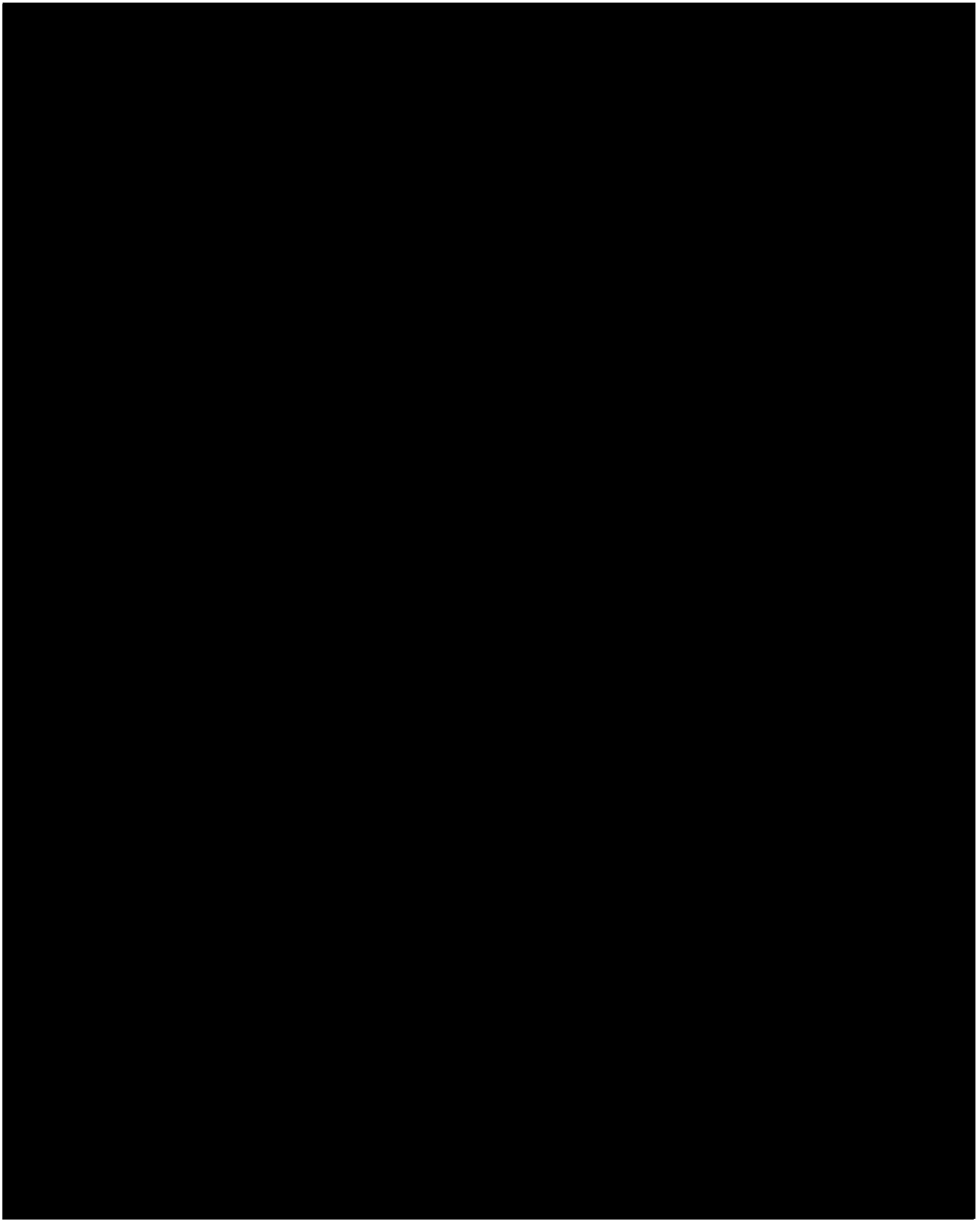
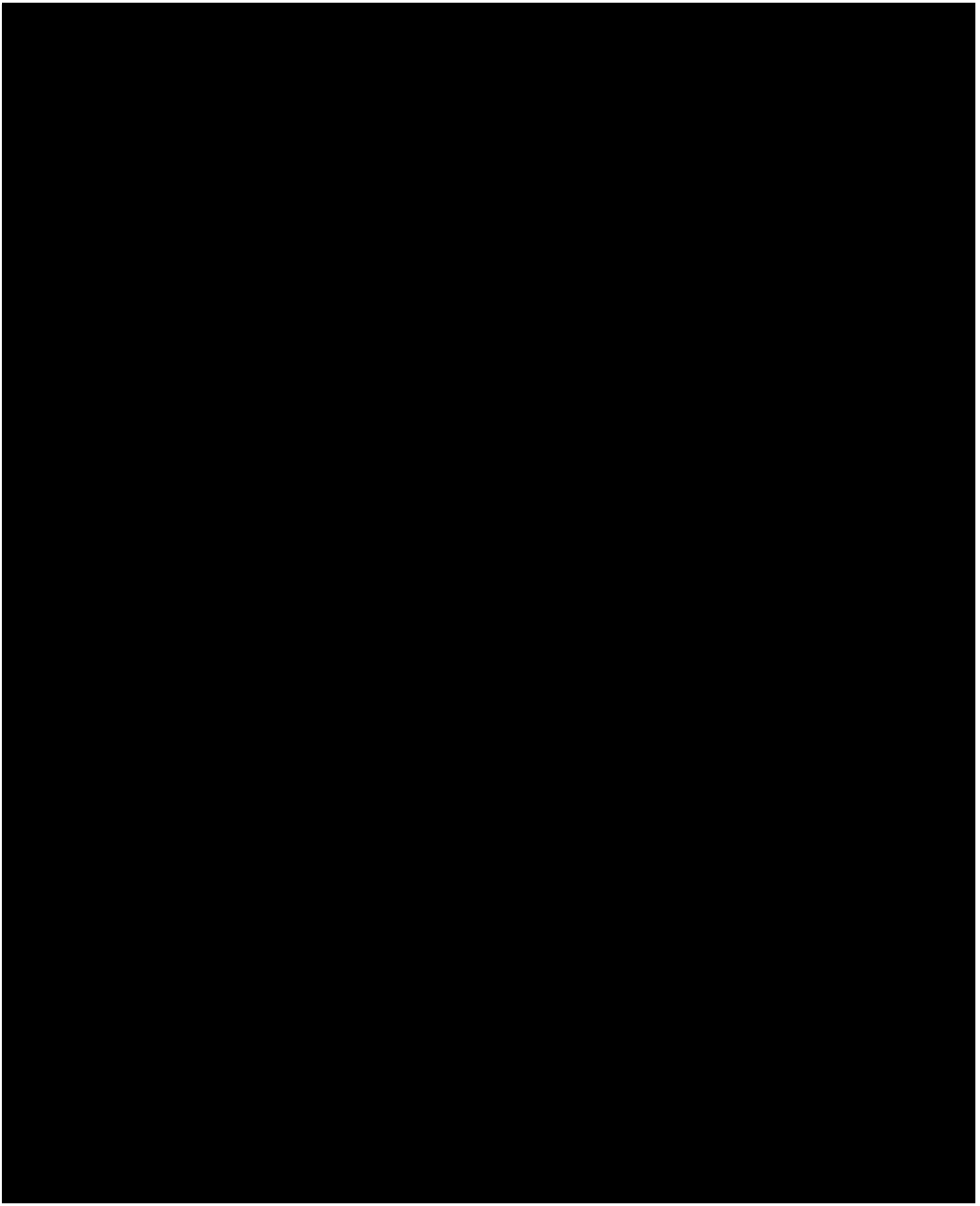
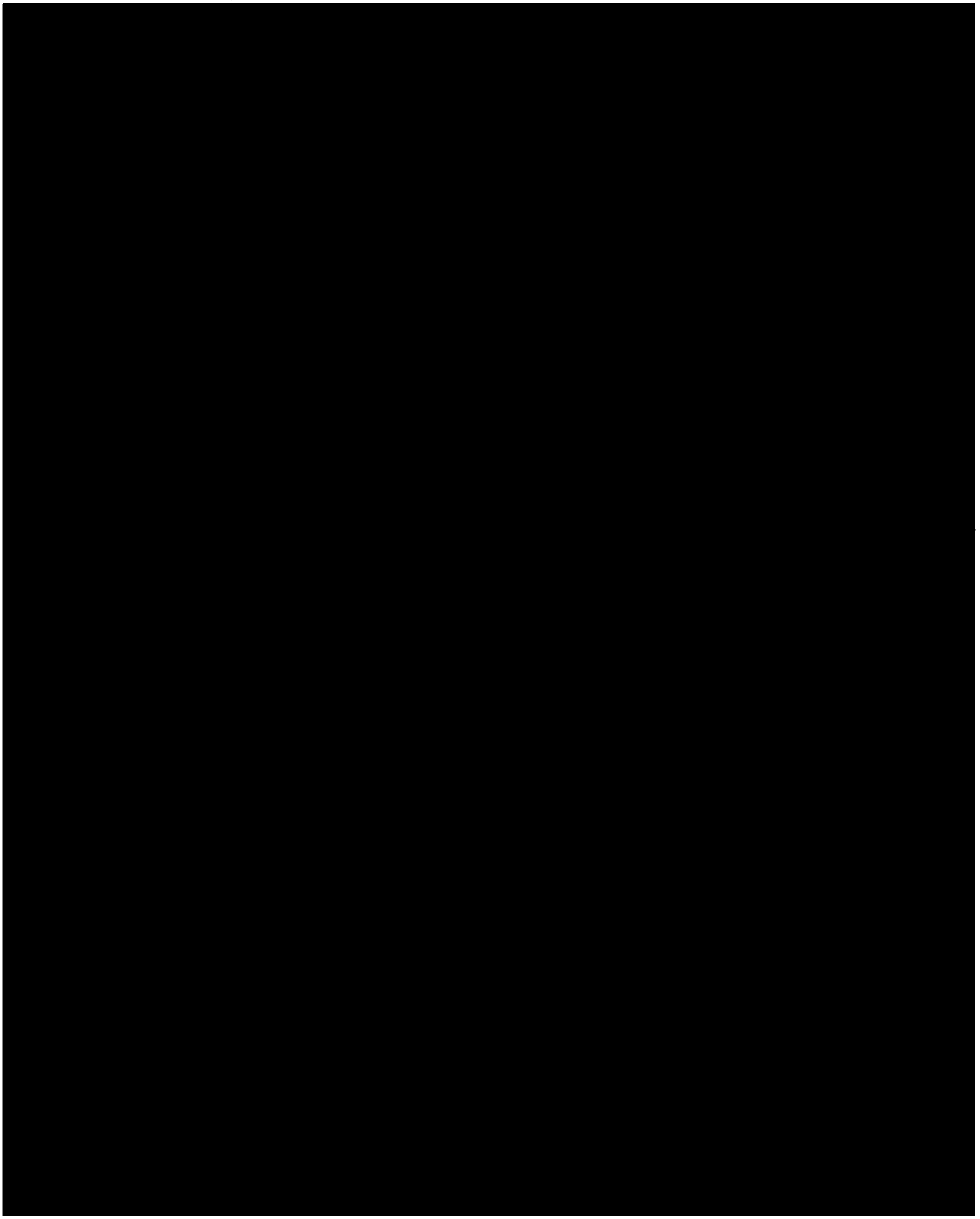
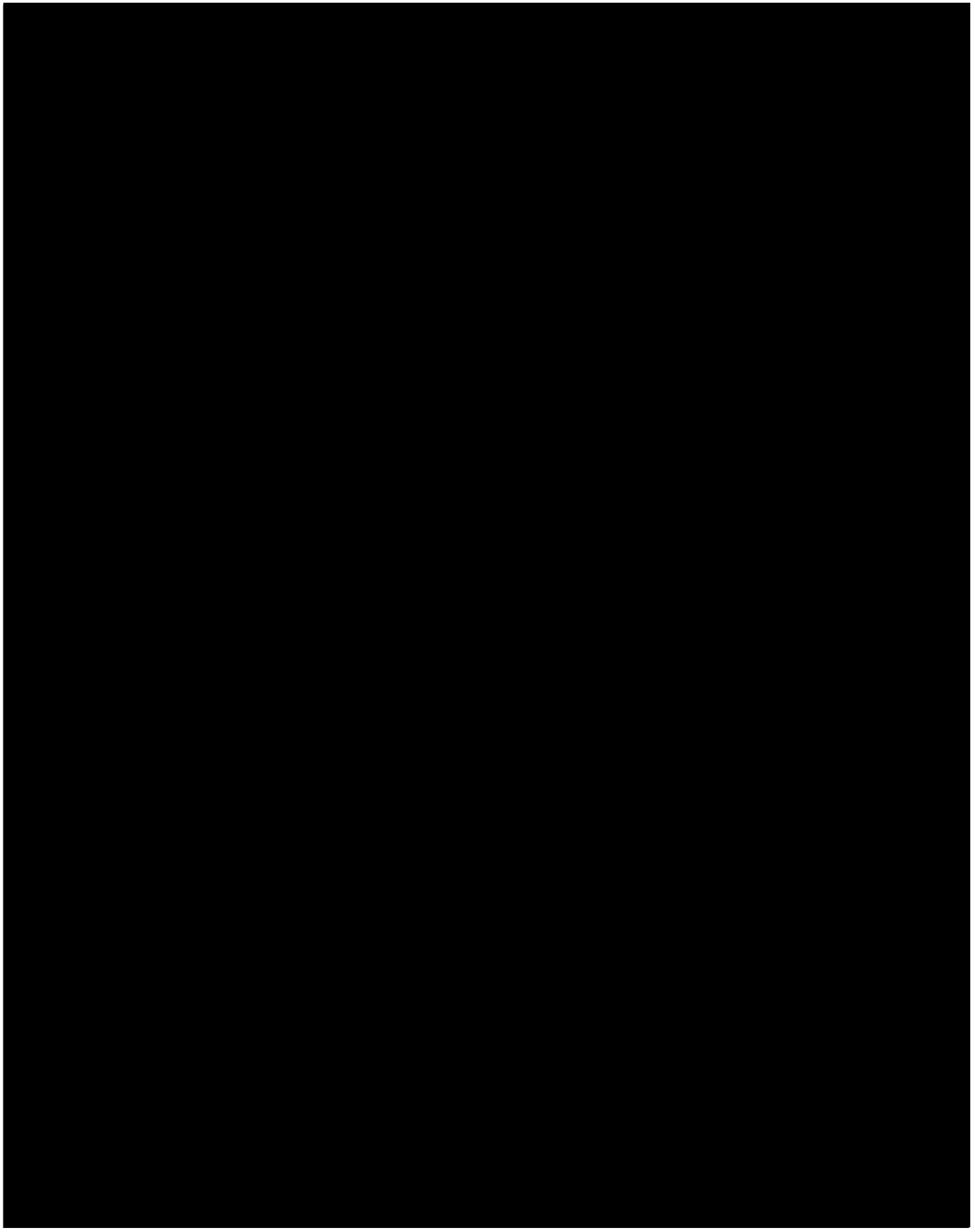


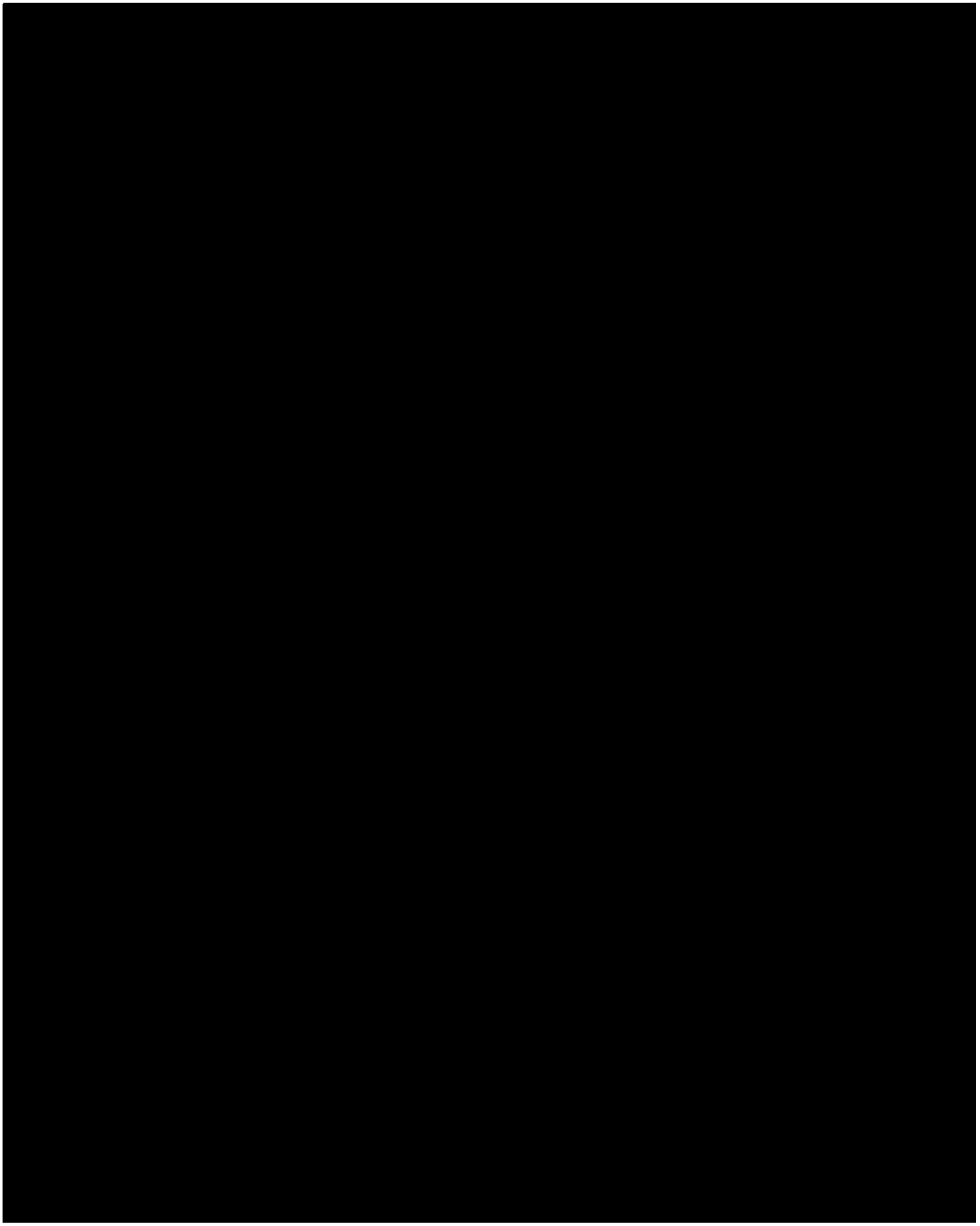
Exhibit 4

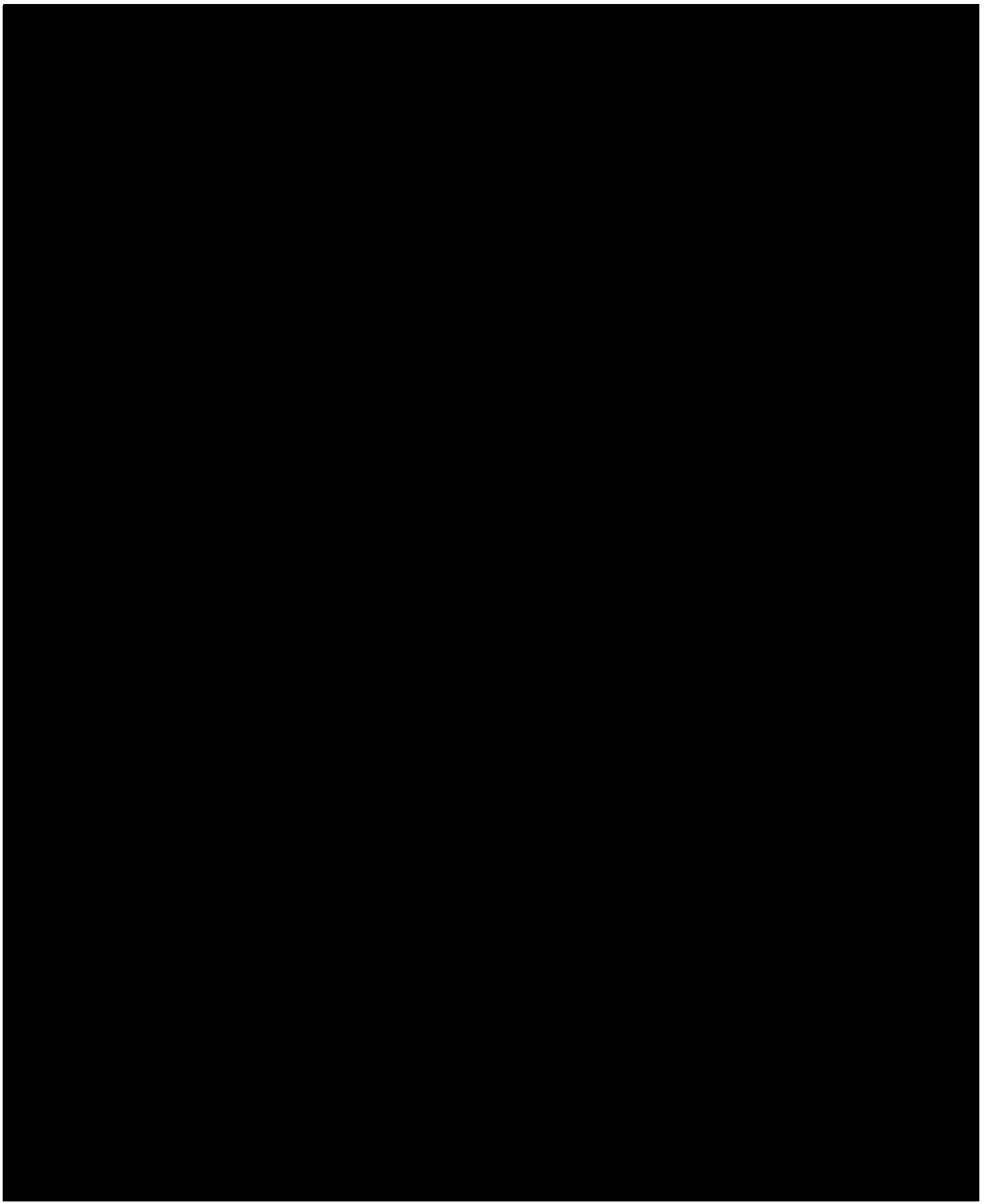


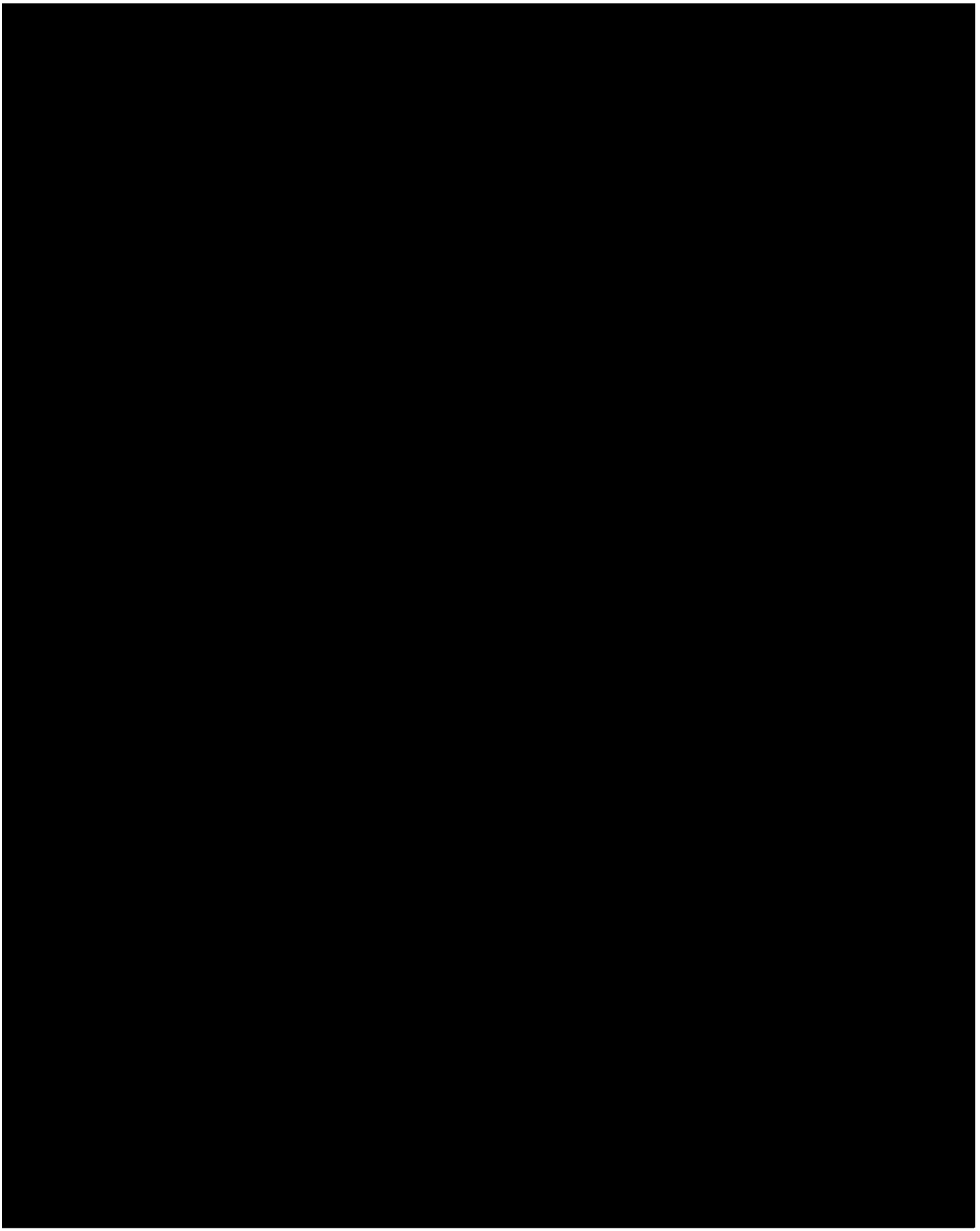


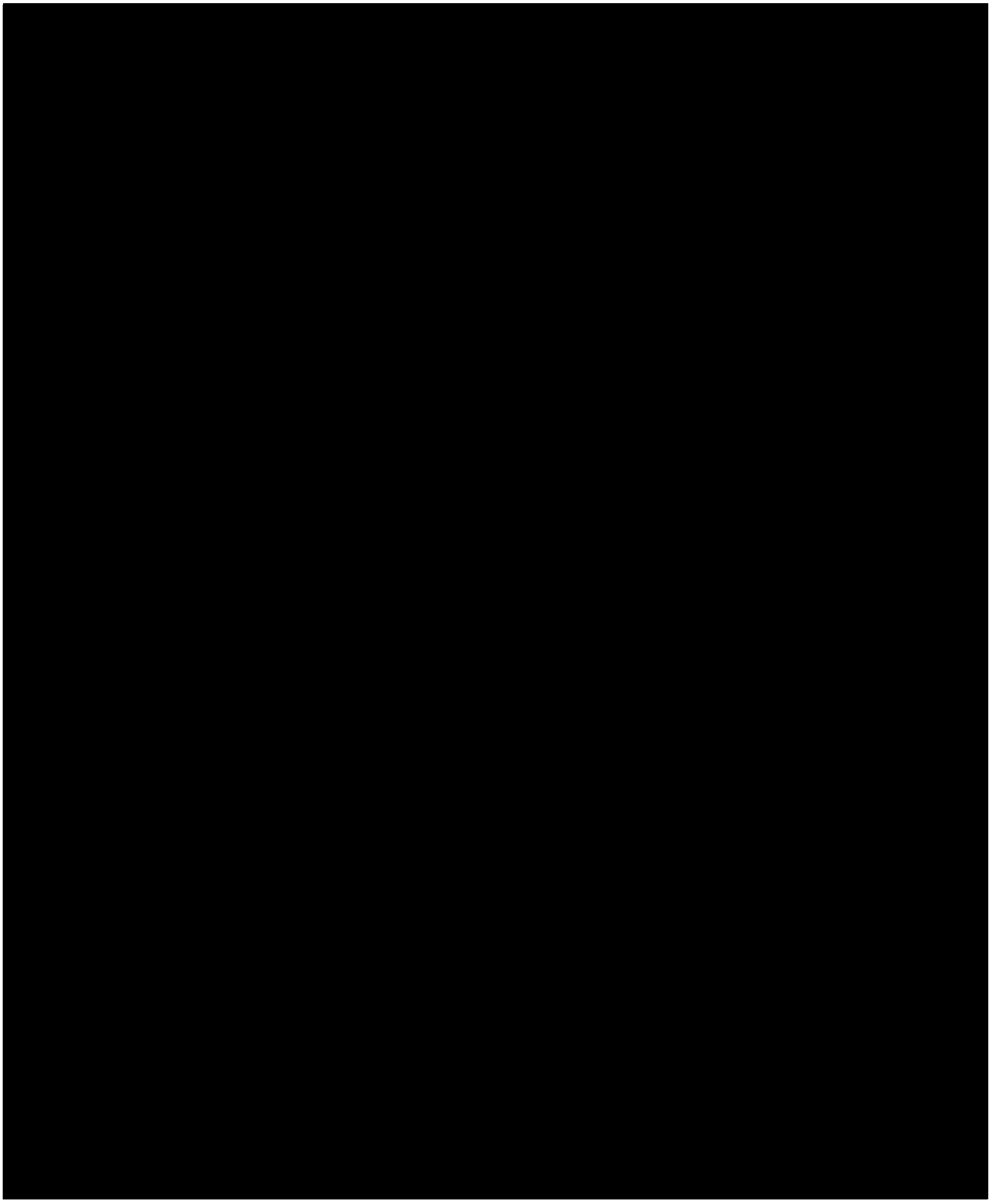


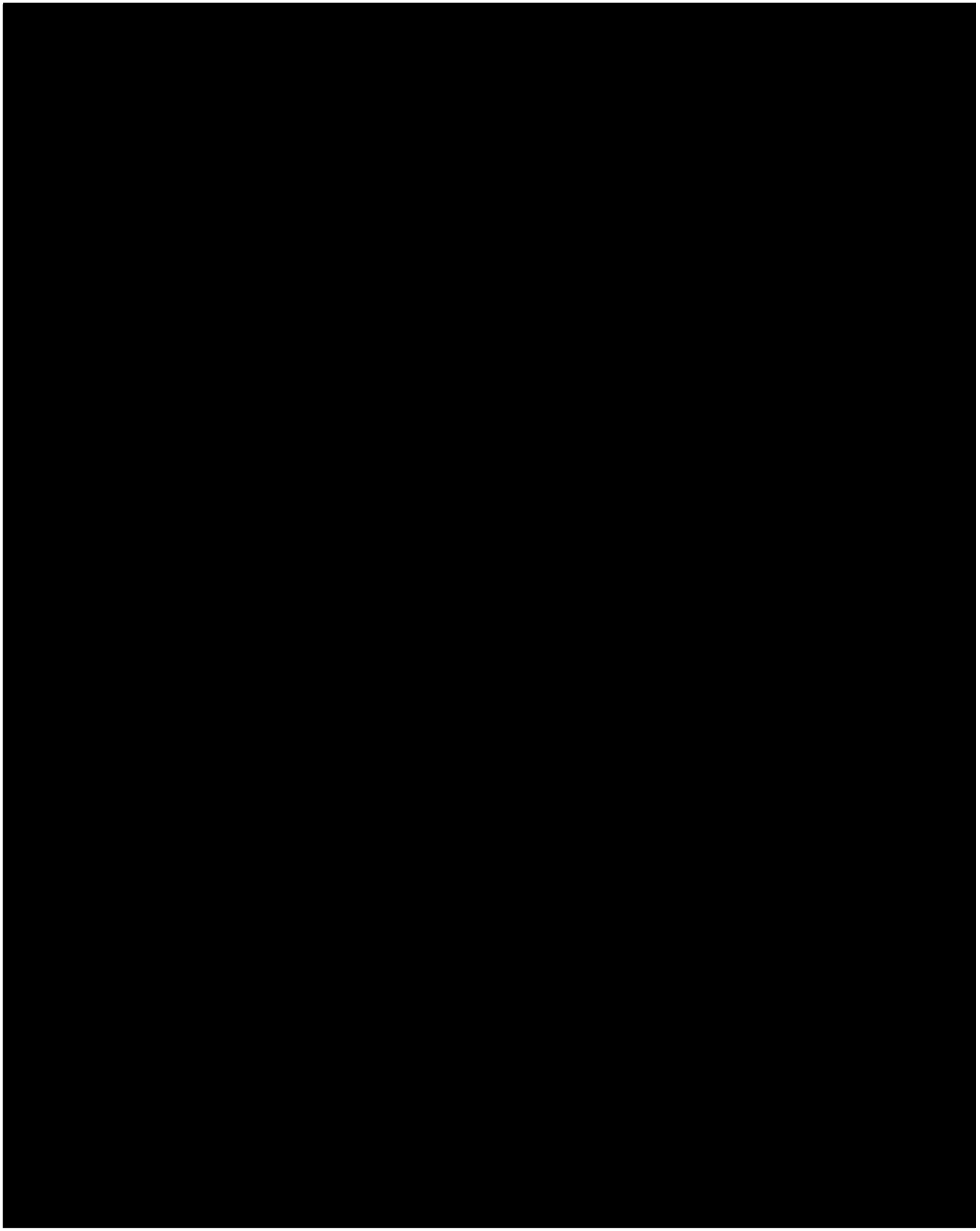


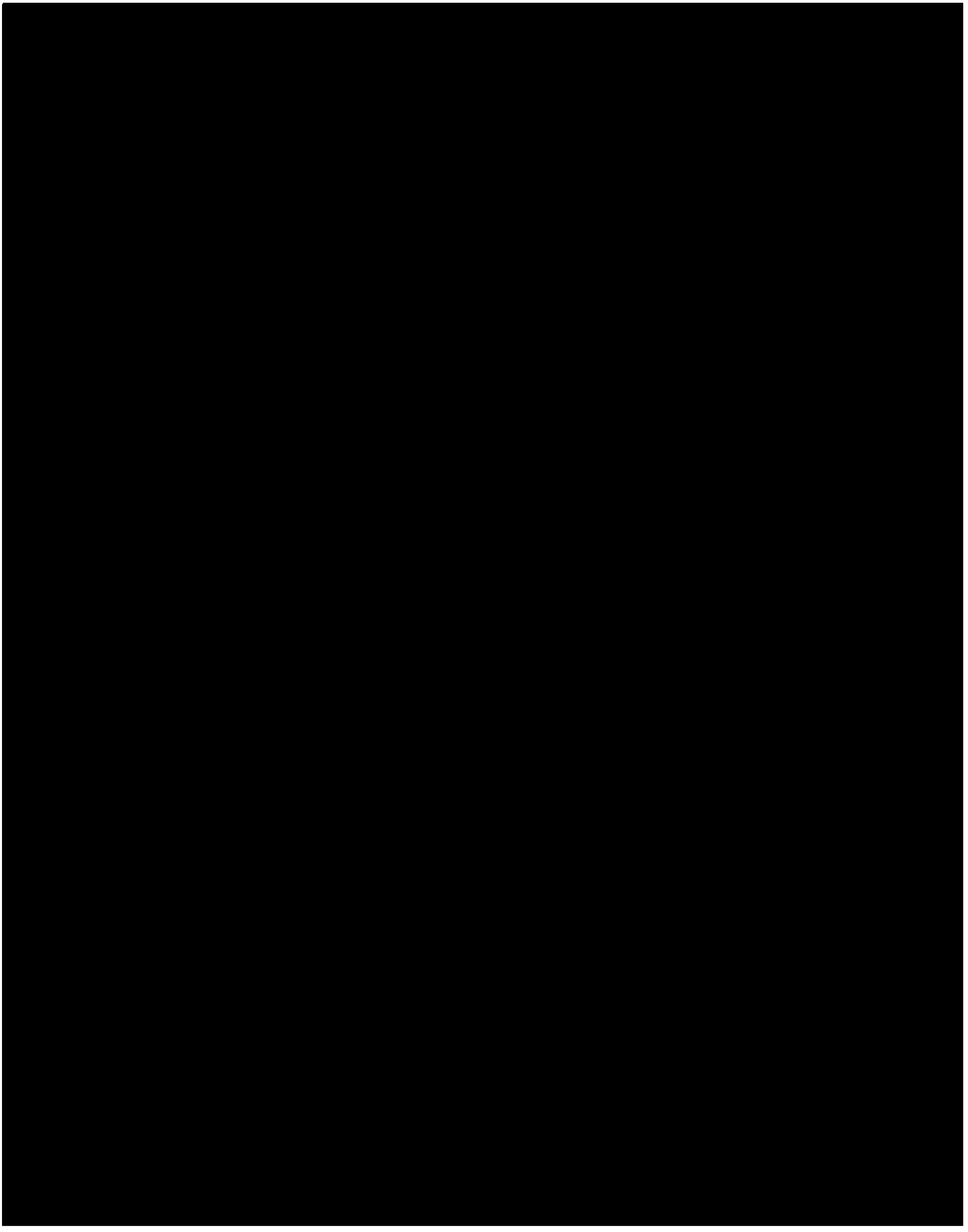


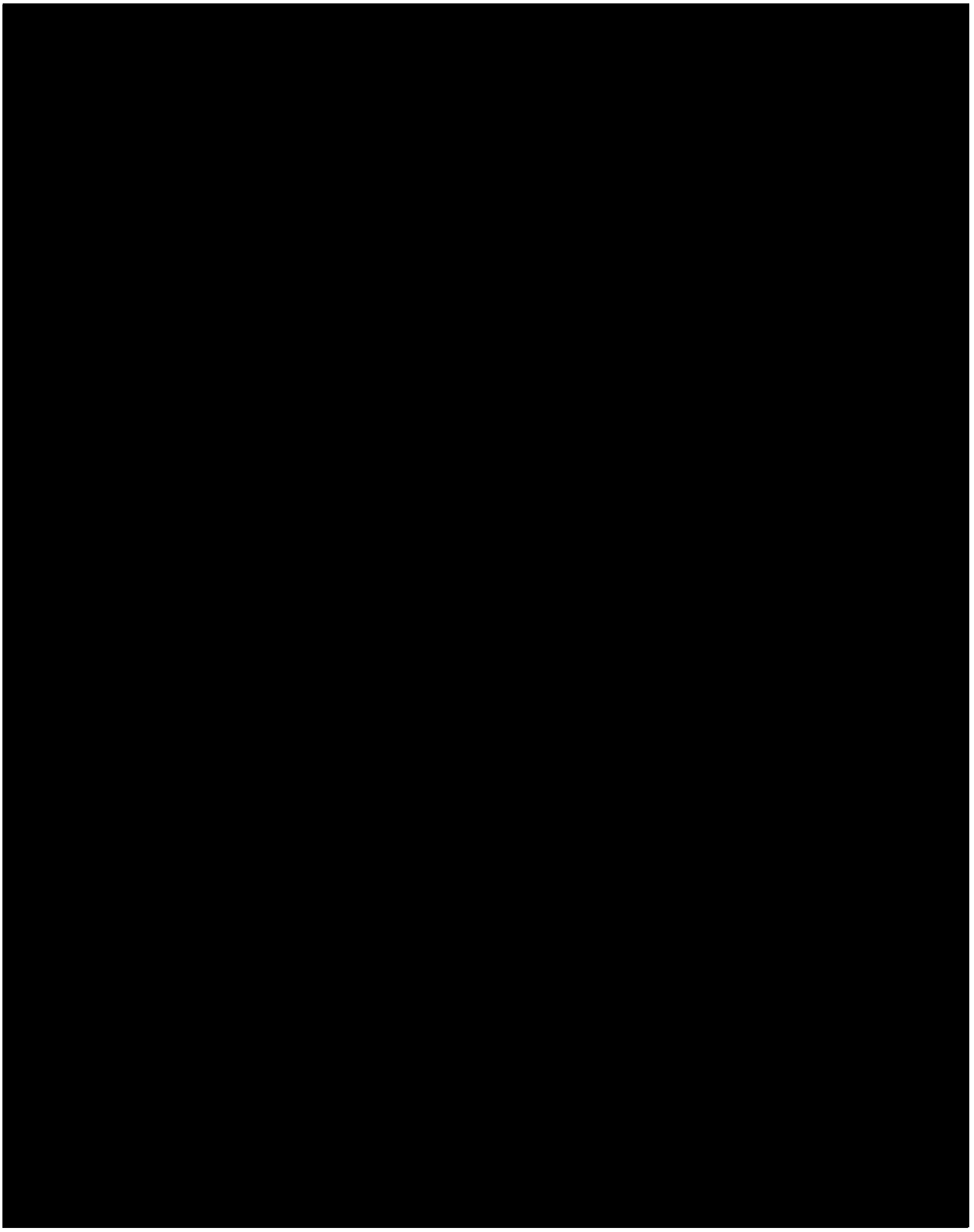


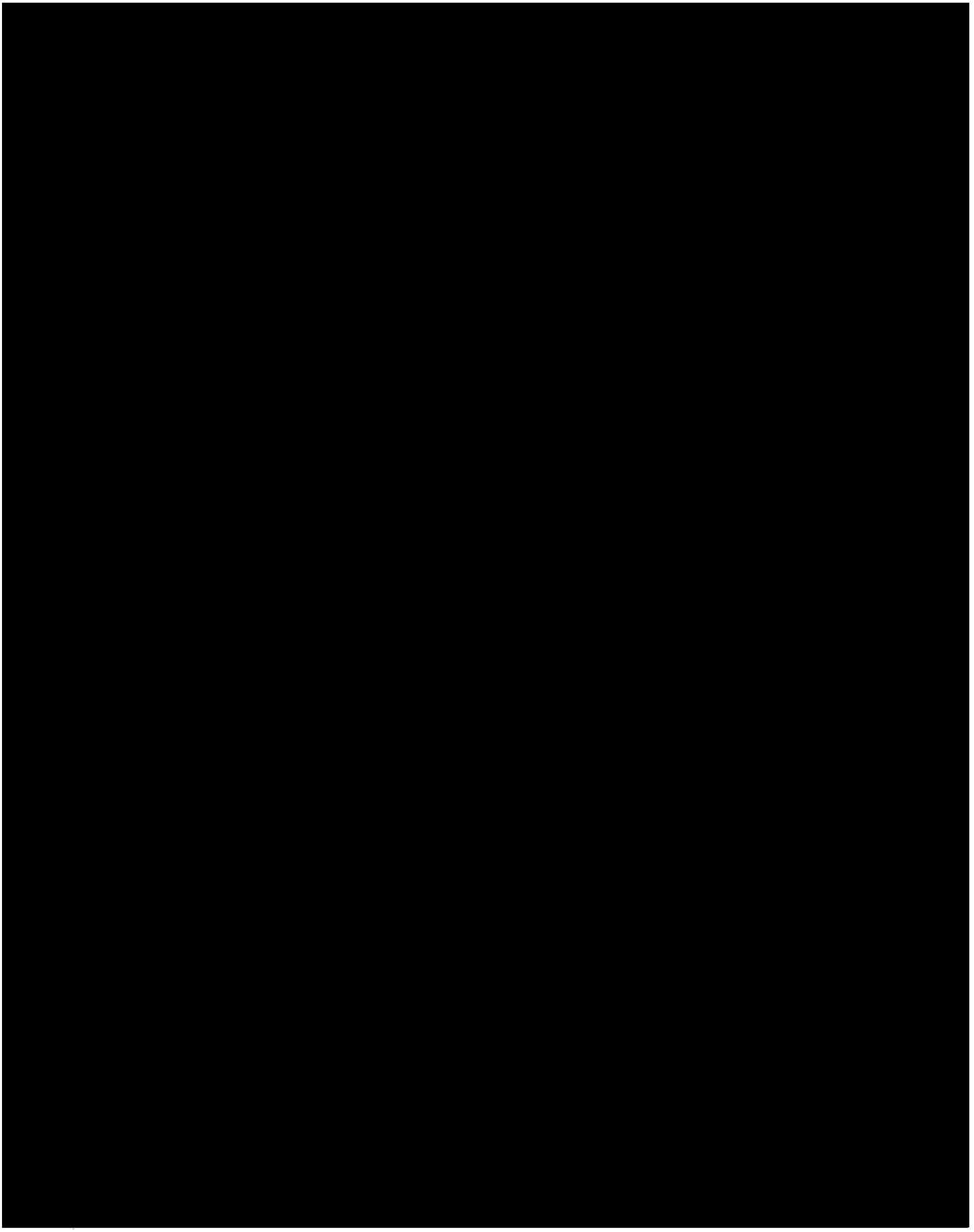


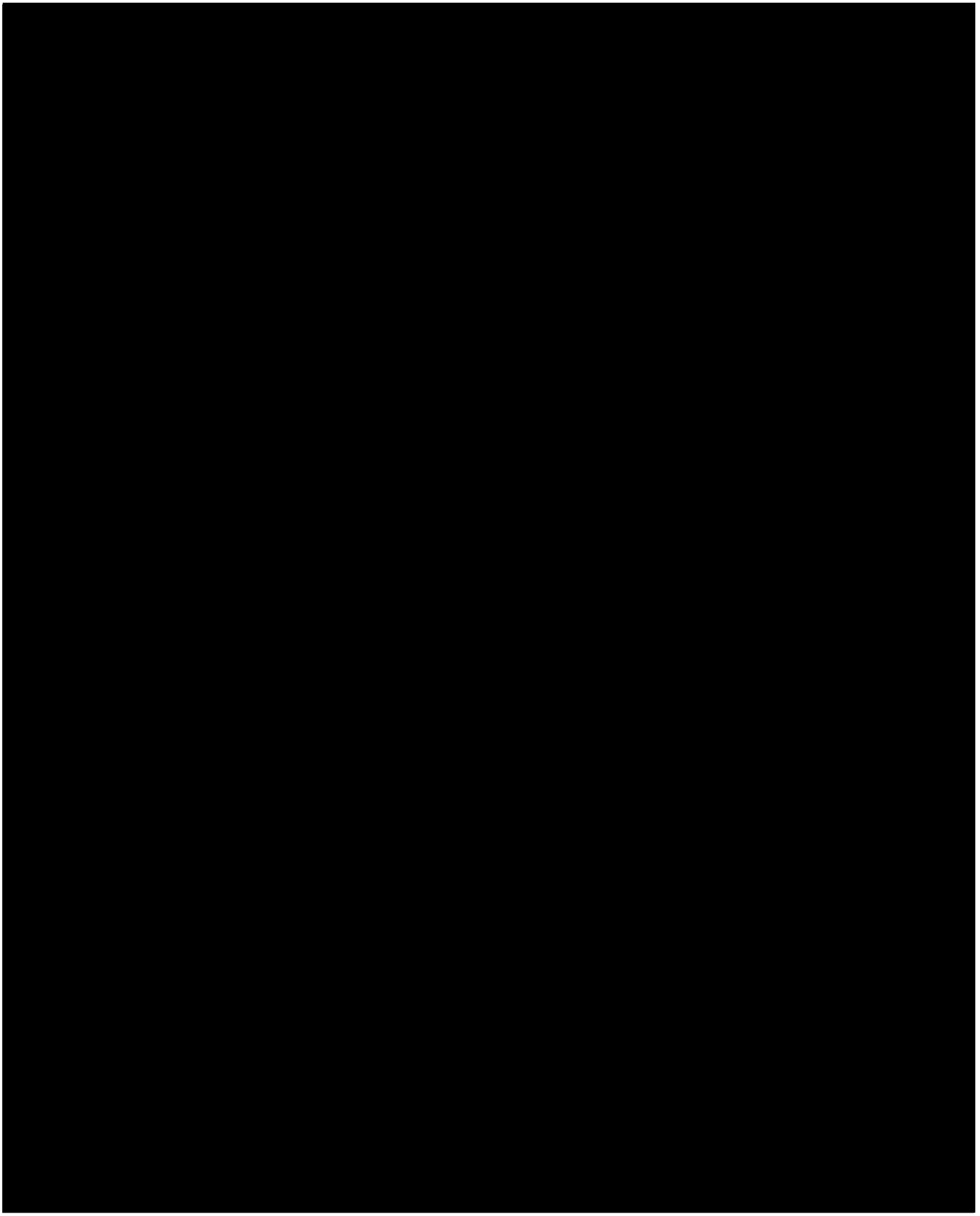


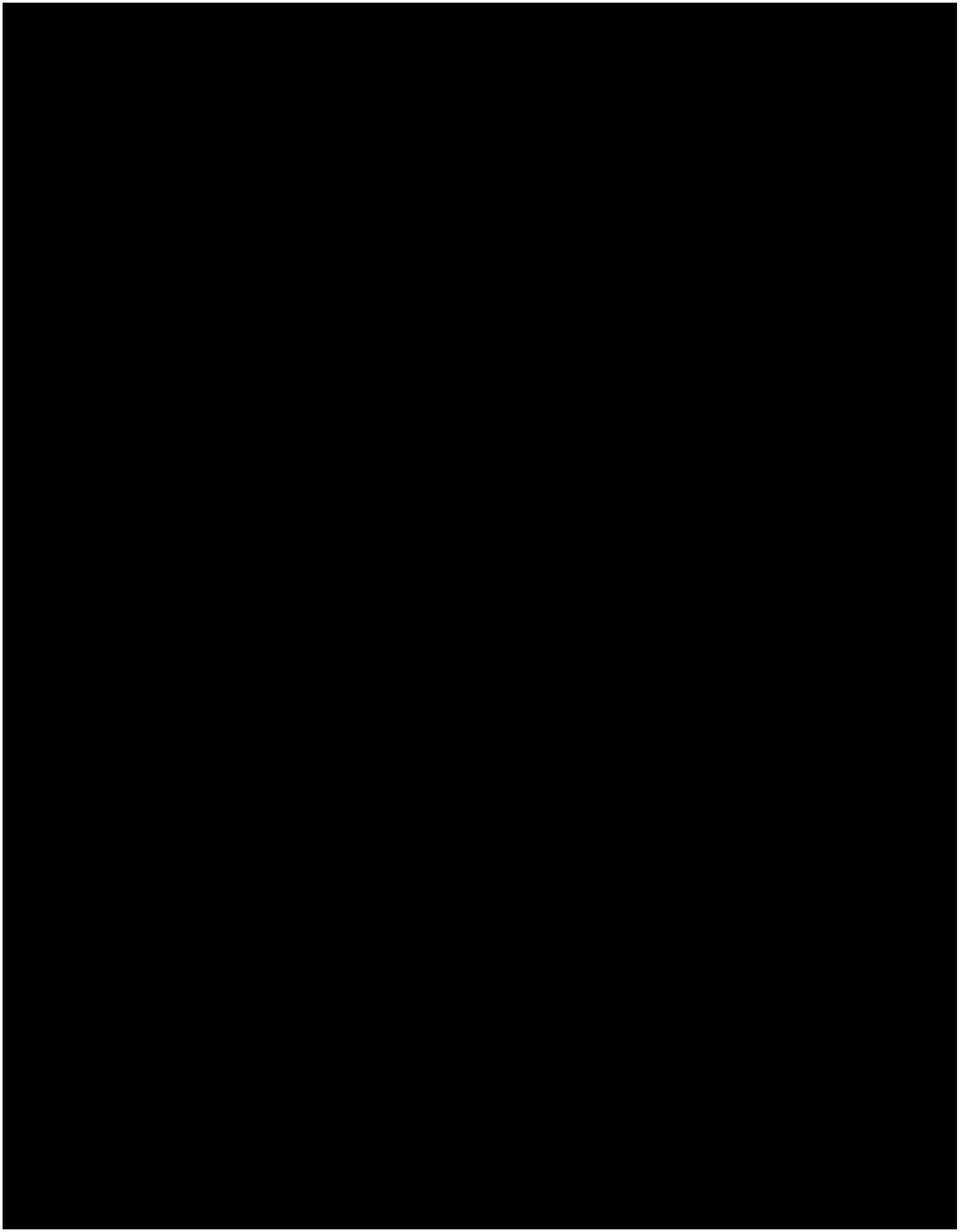


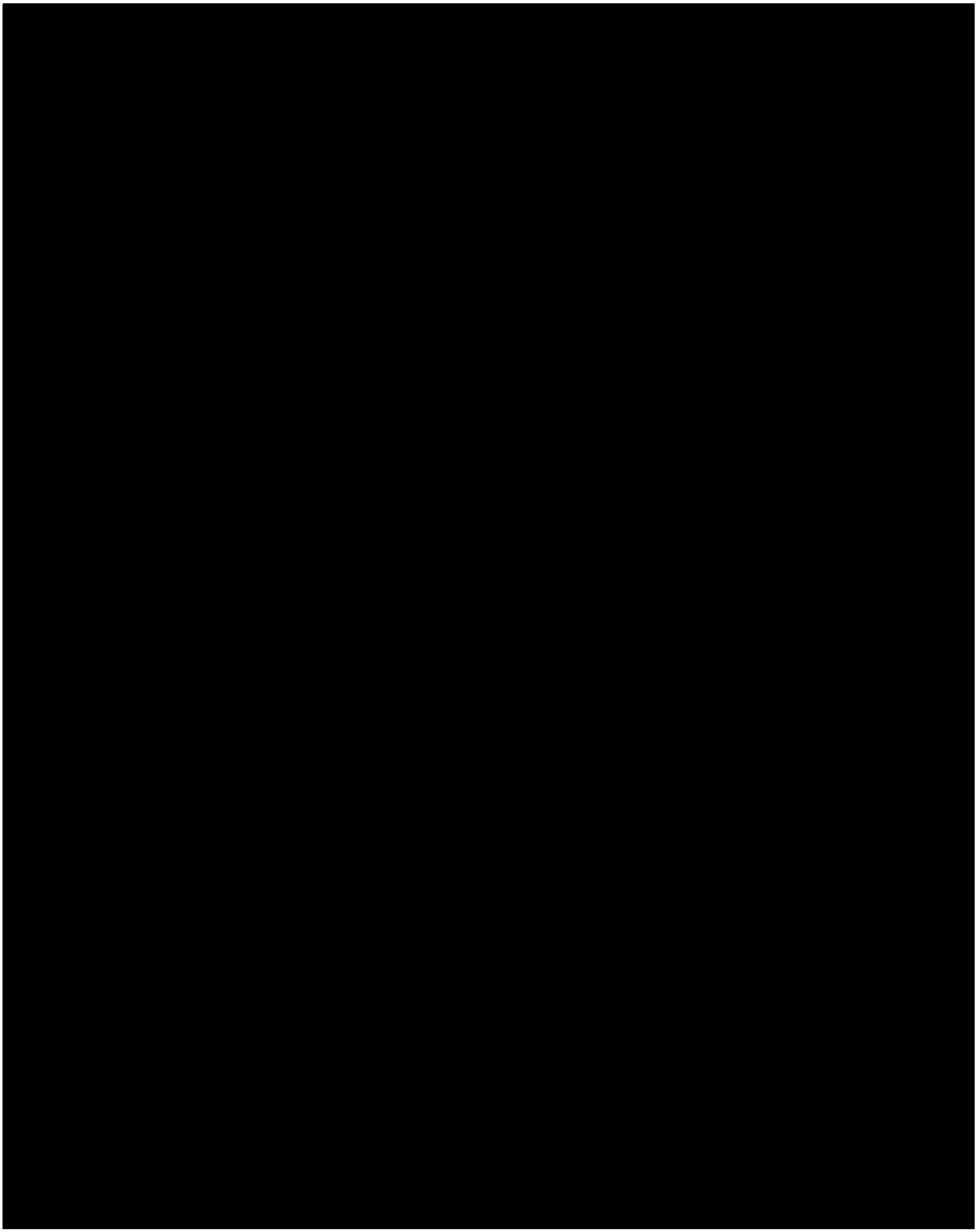


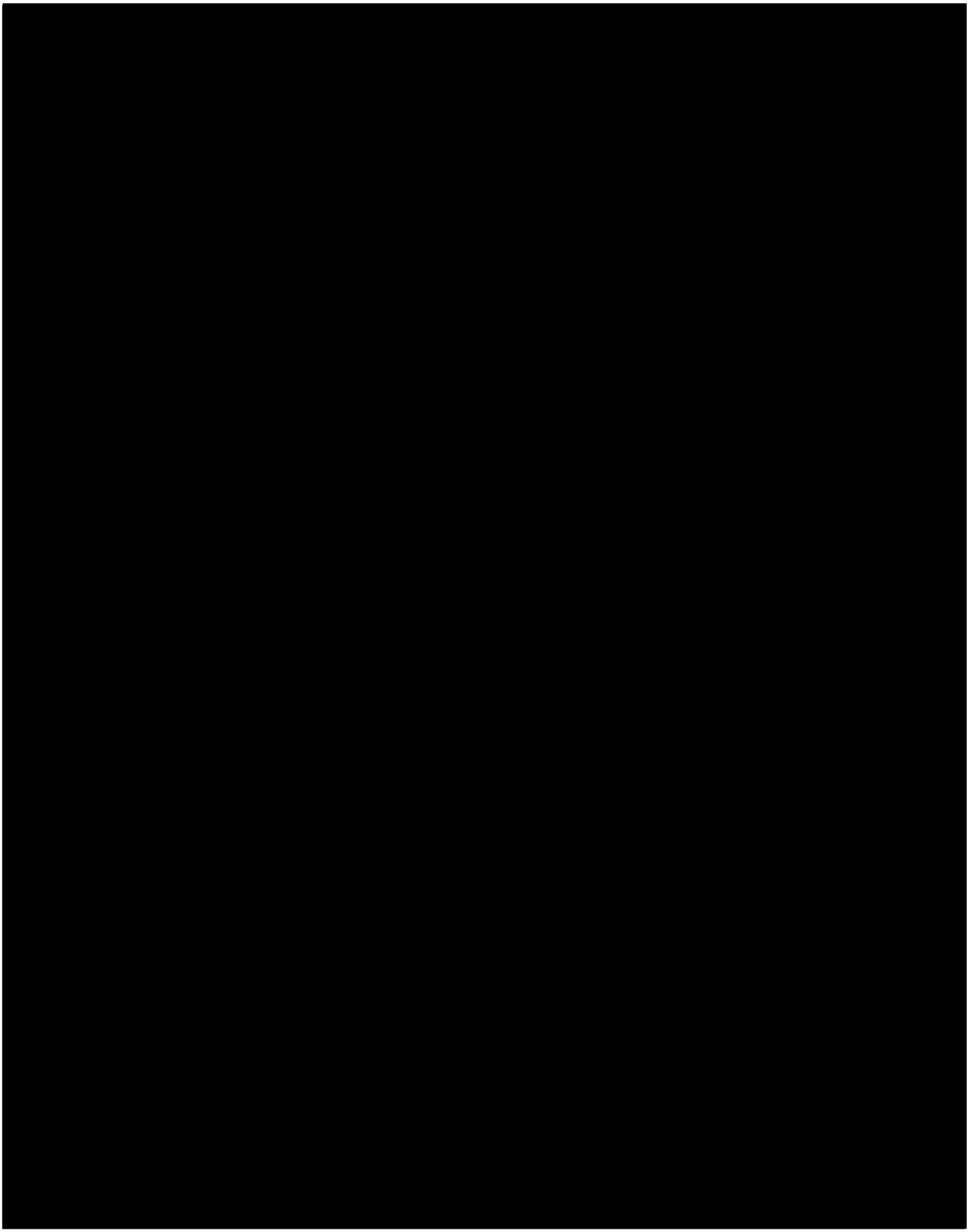


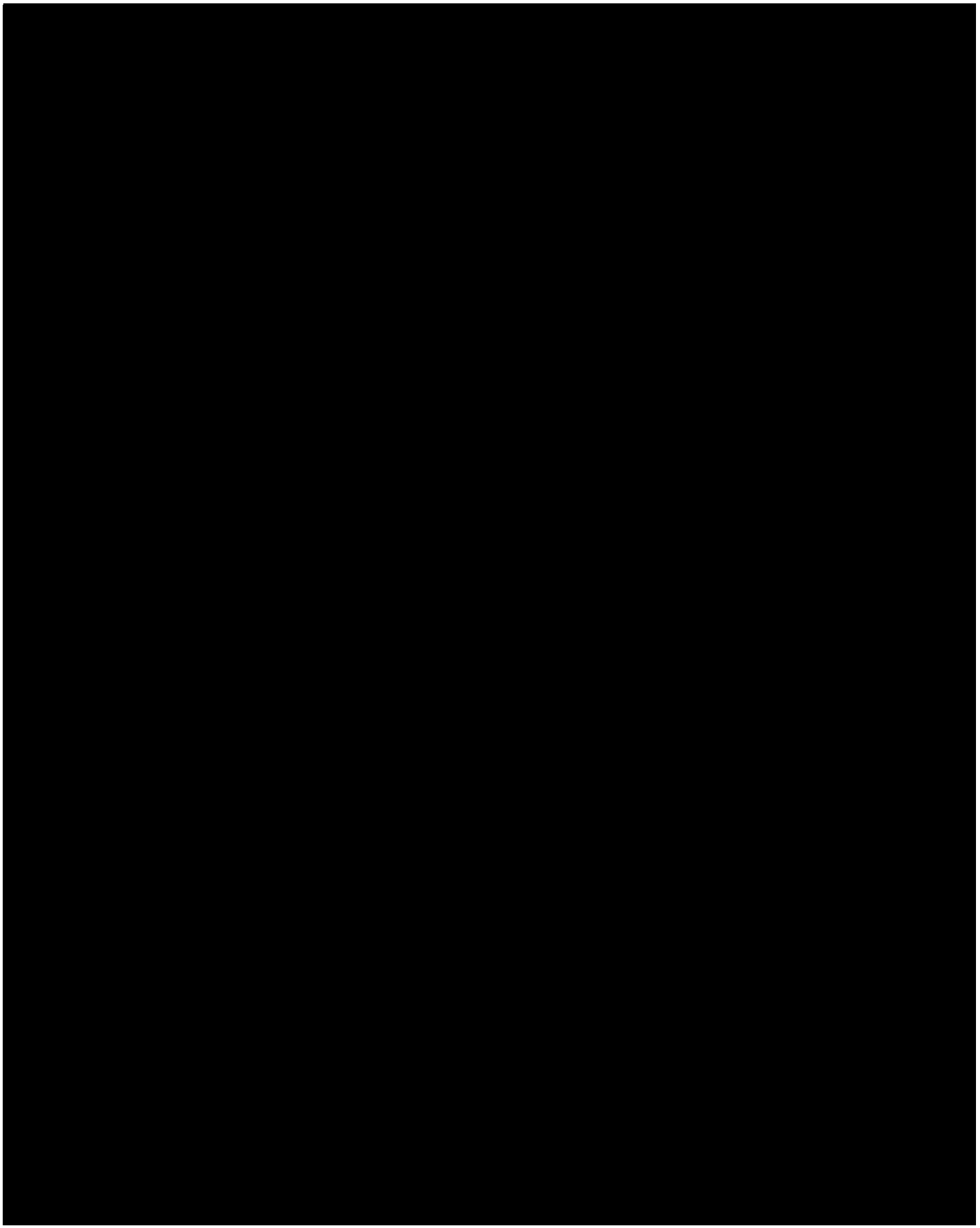


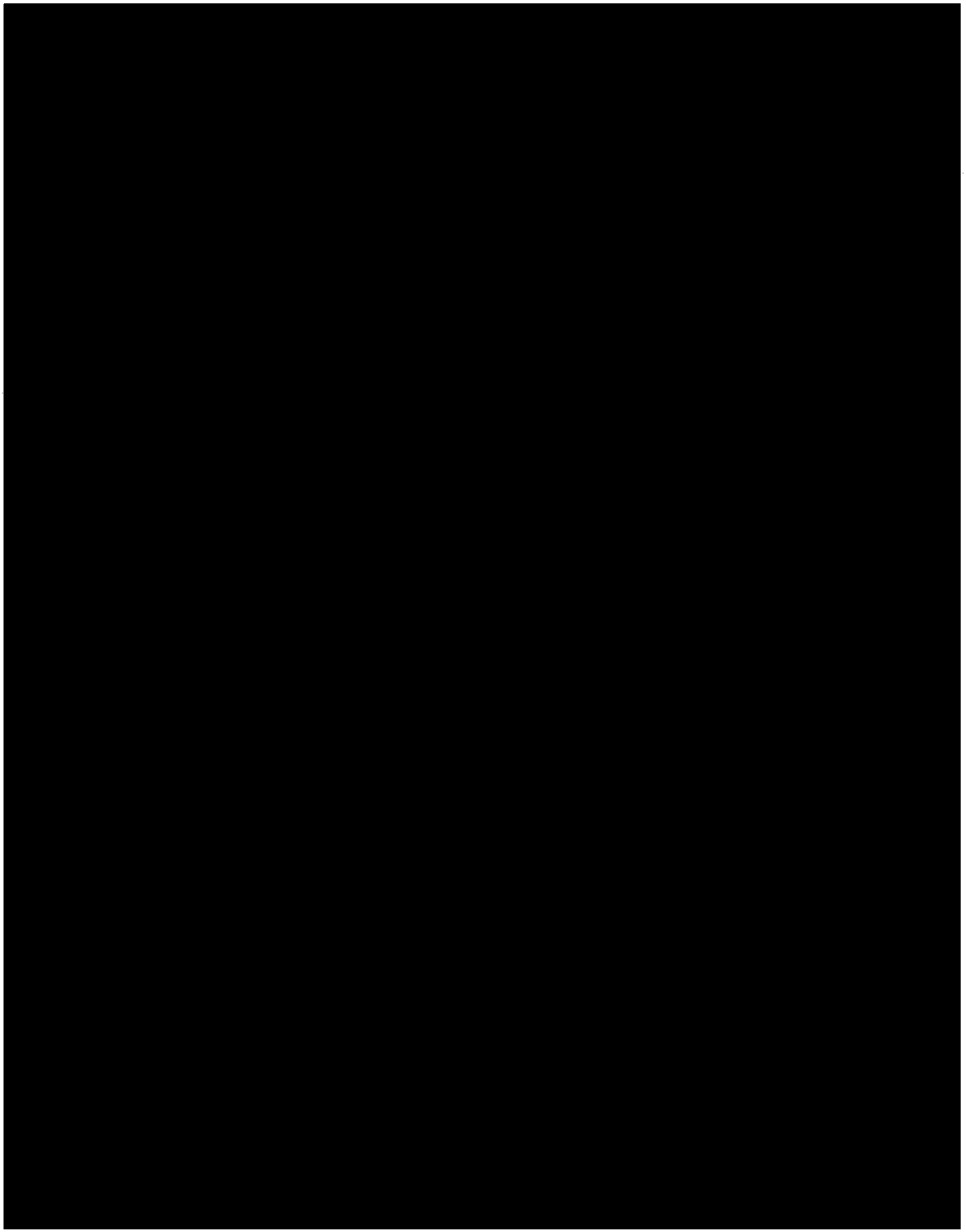


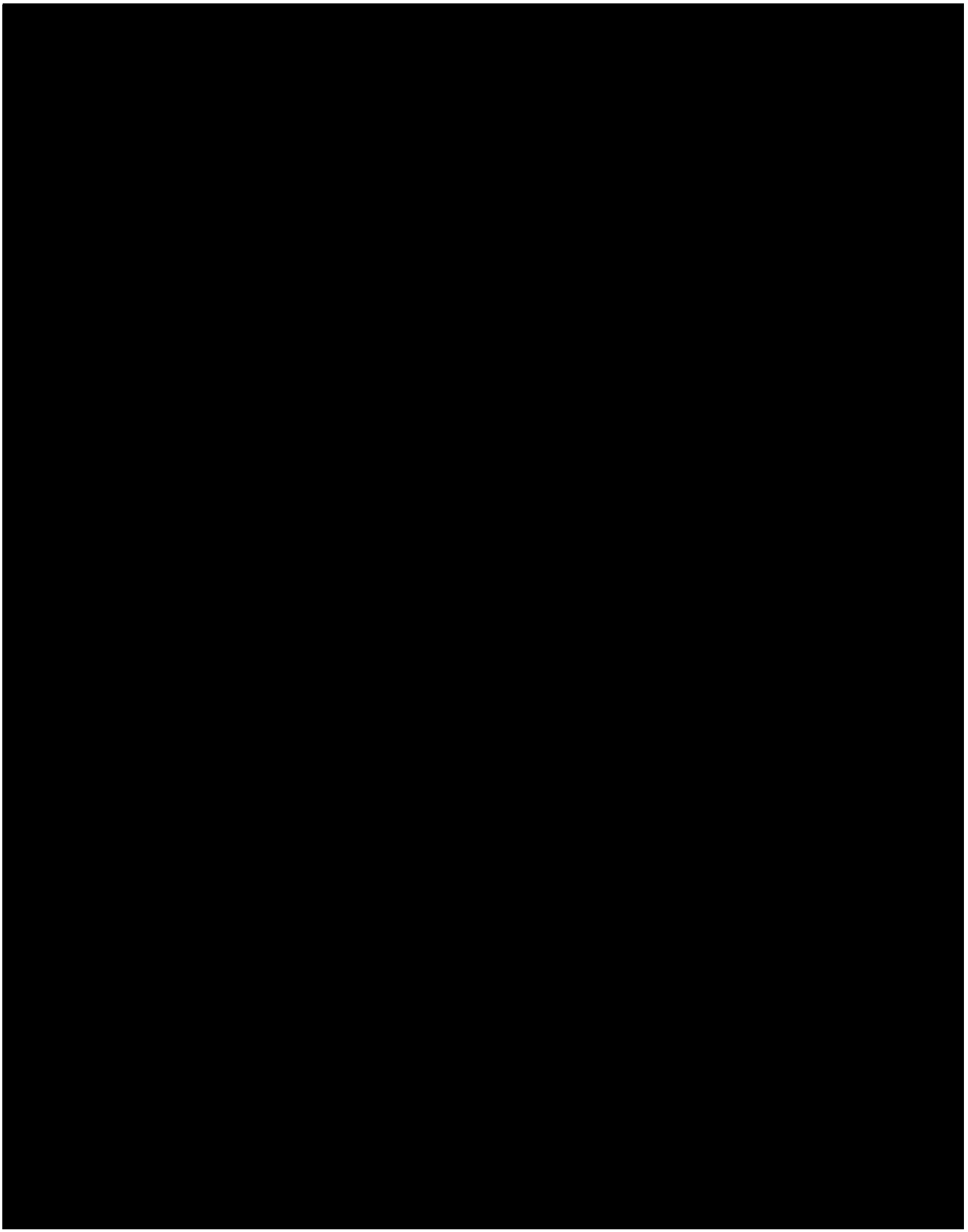


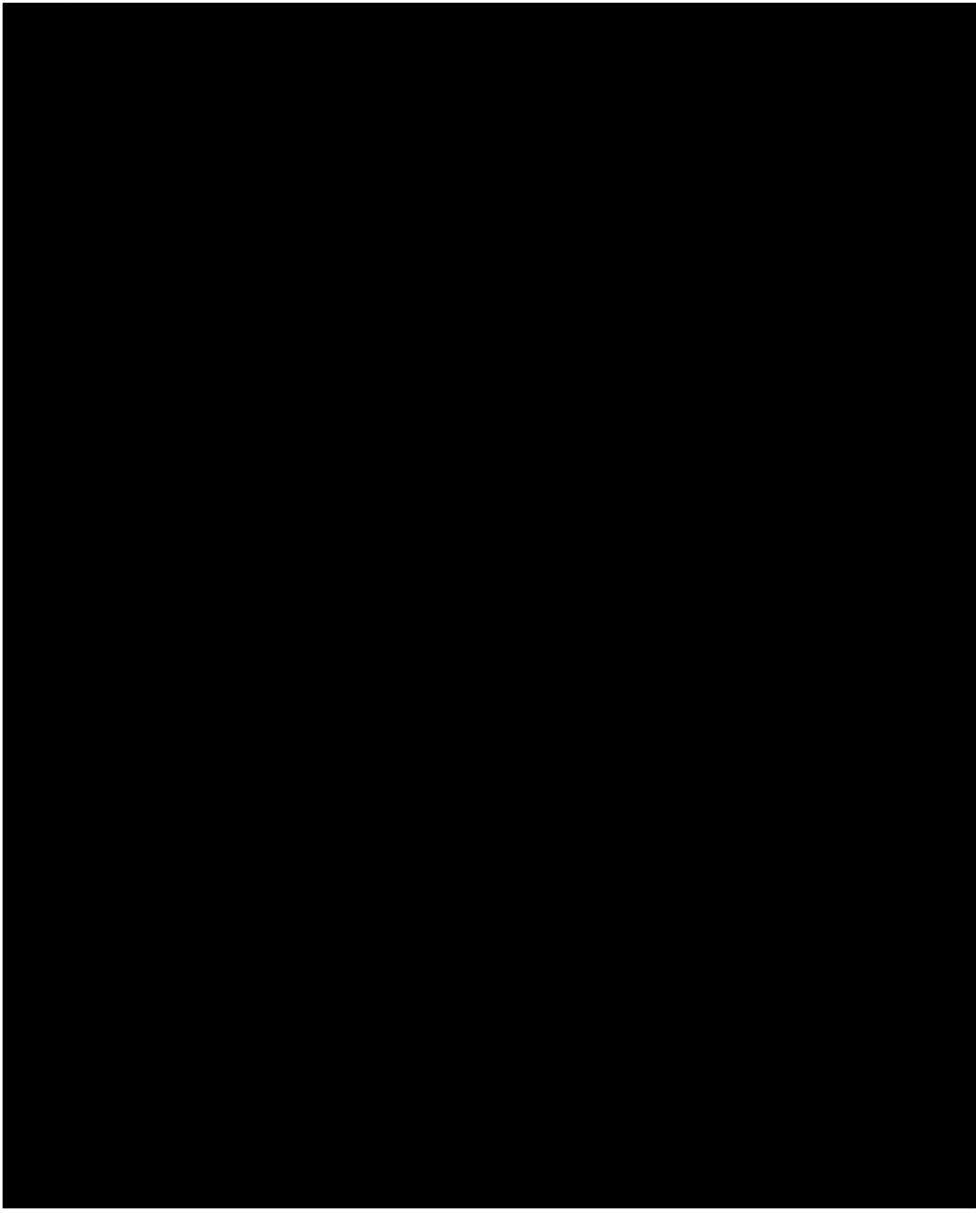












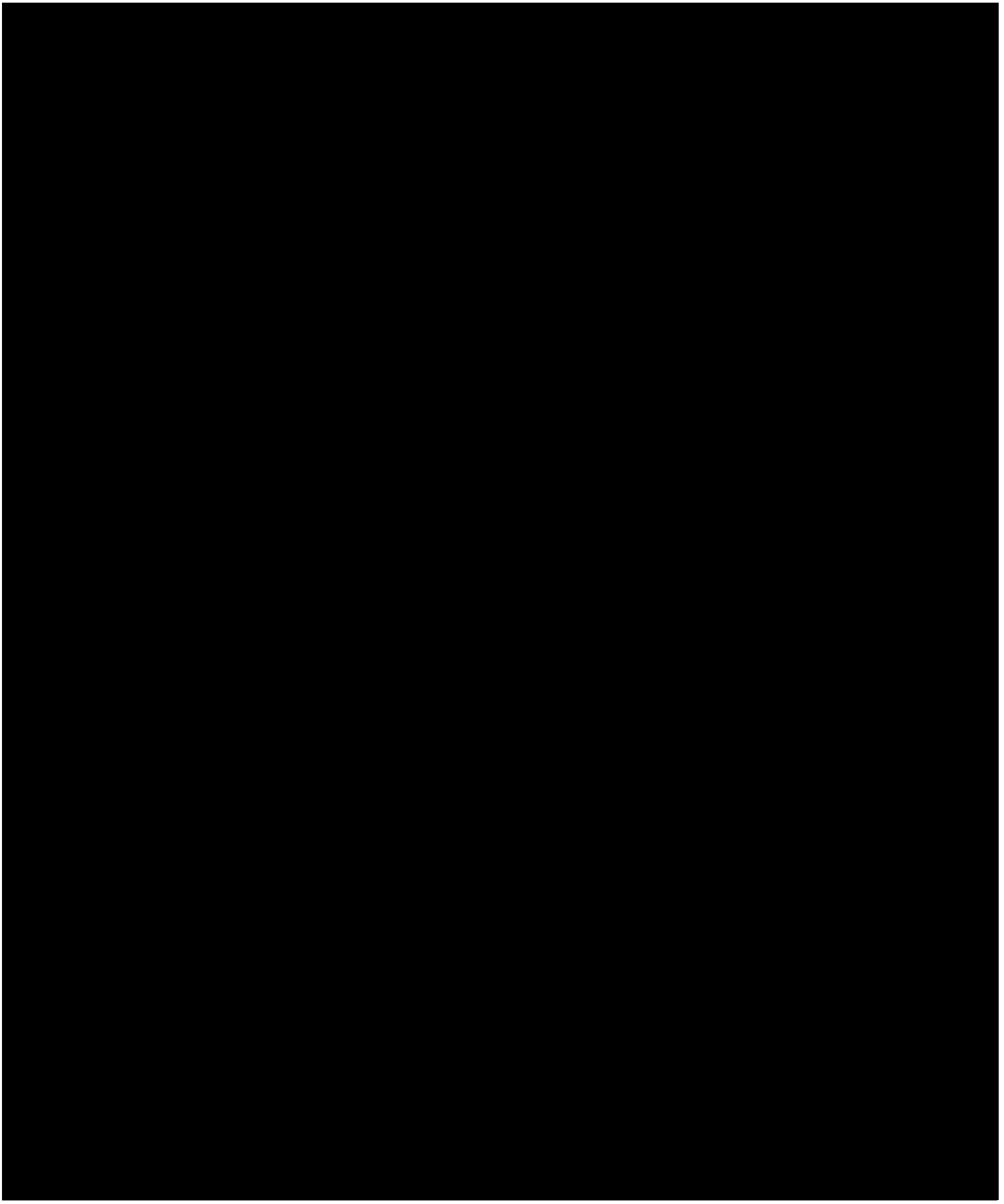
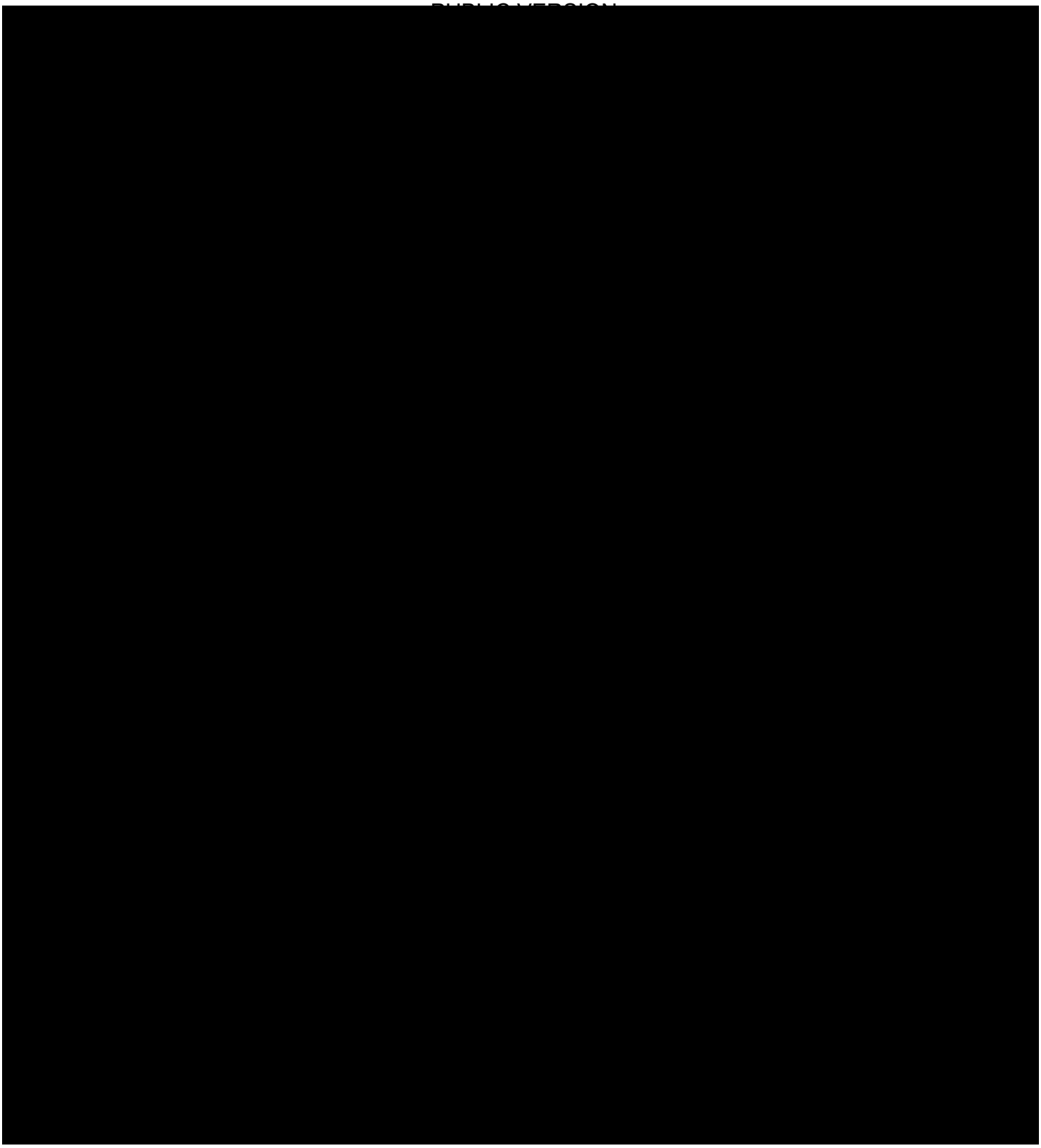
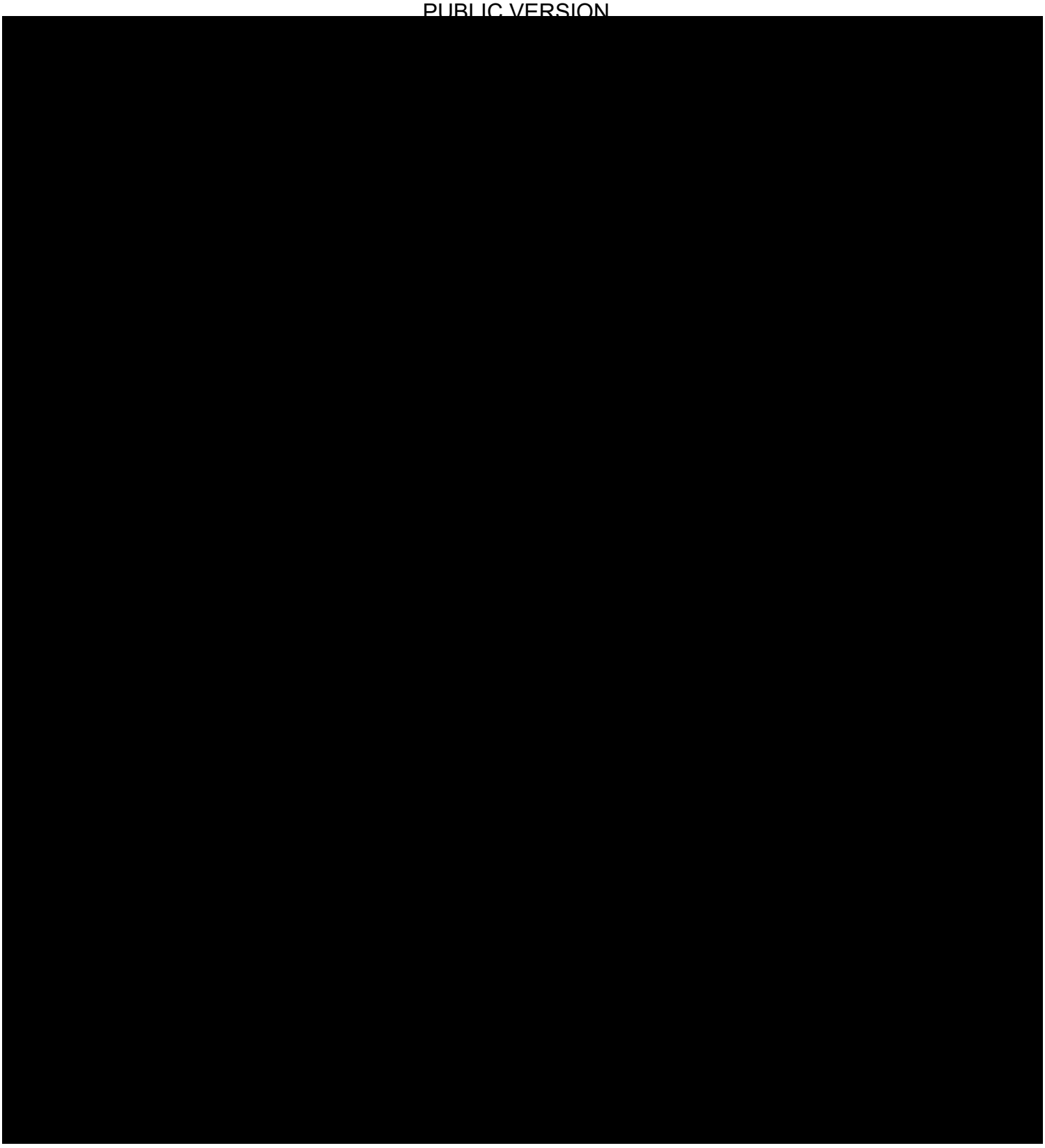
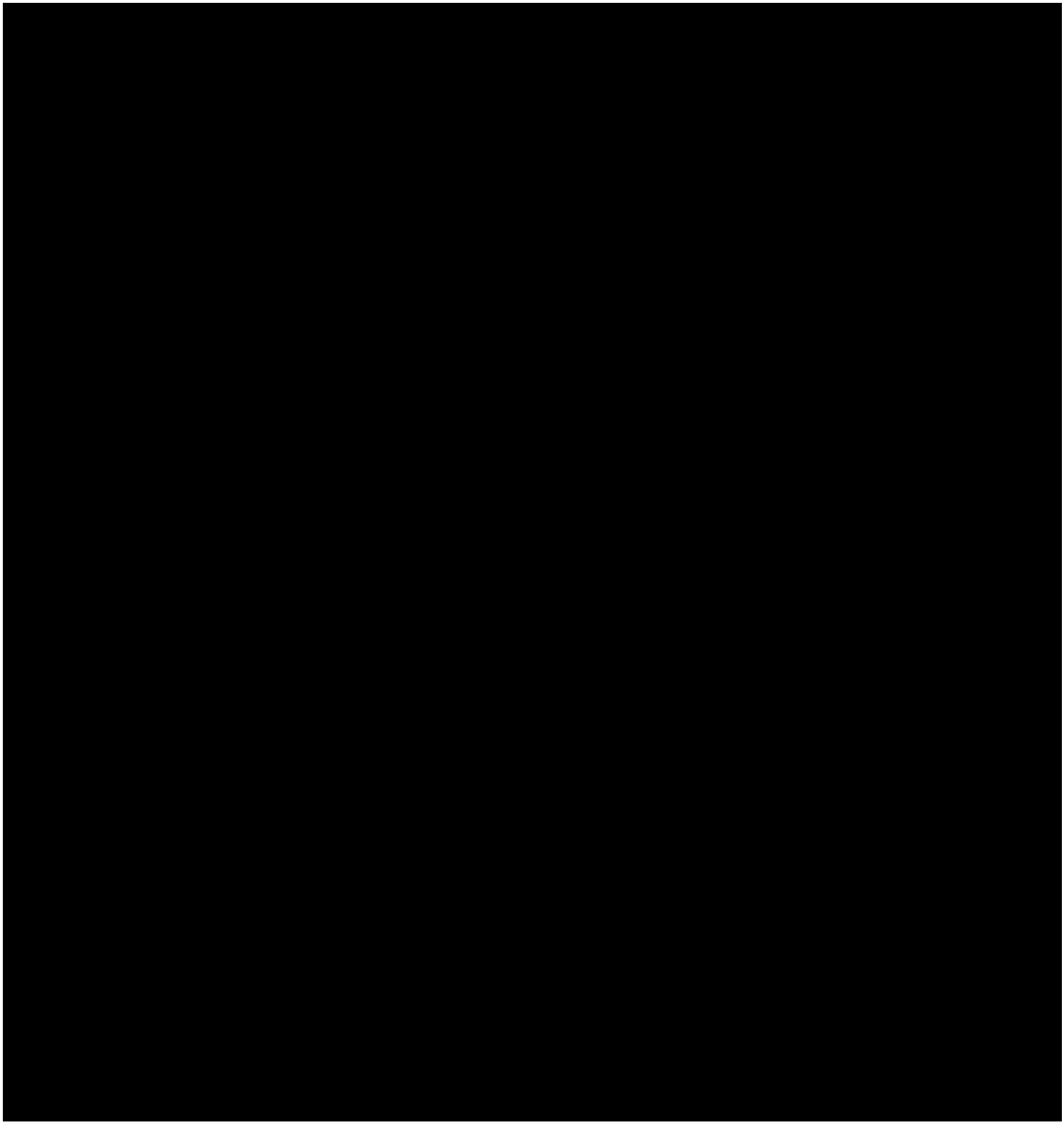
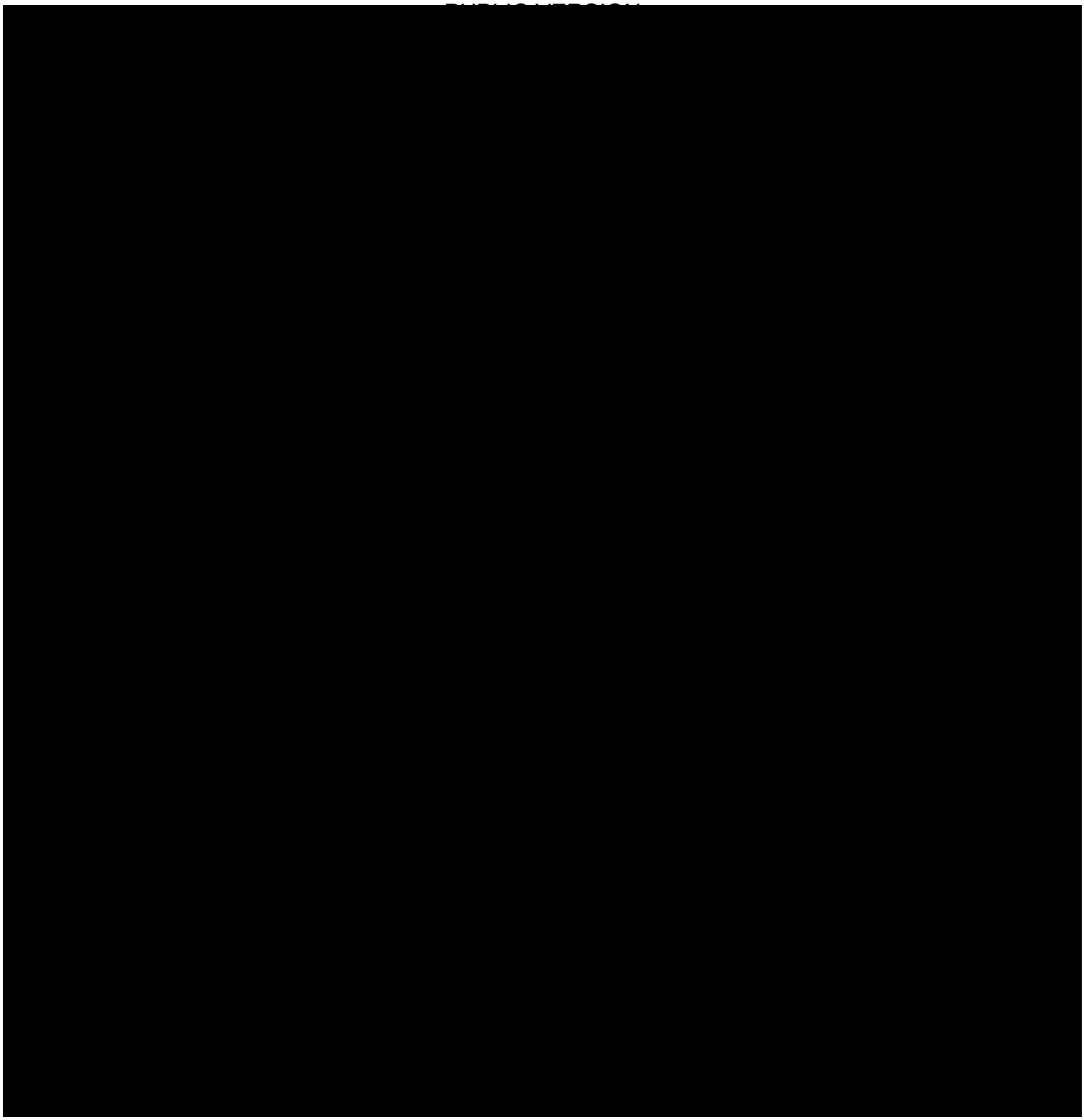


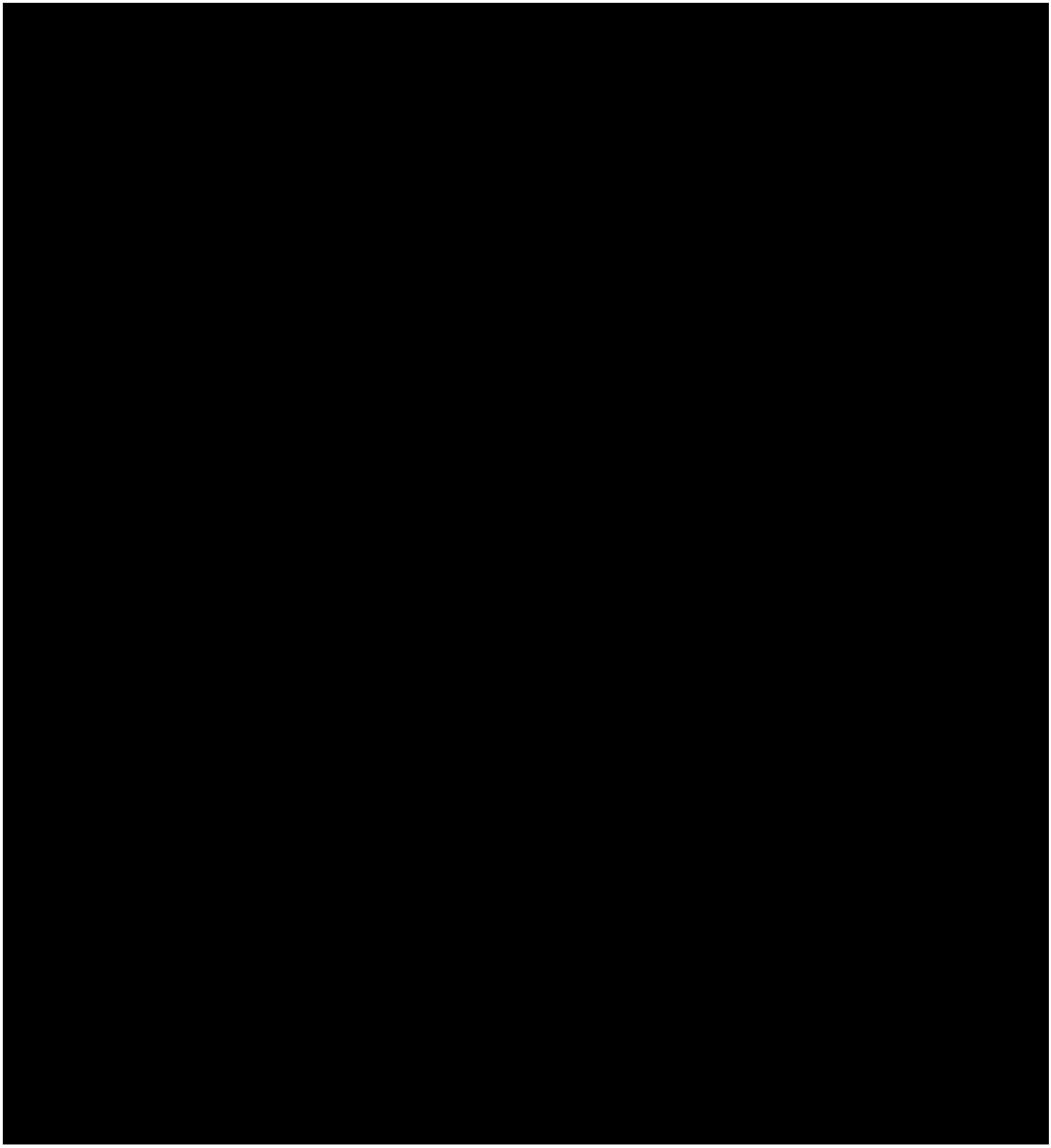
Exhibit 5

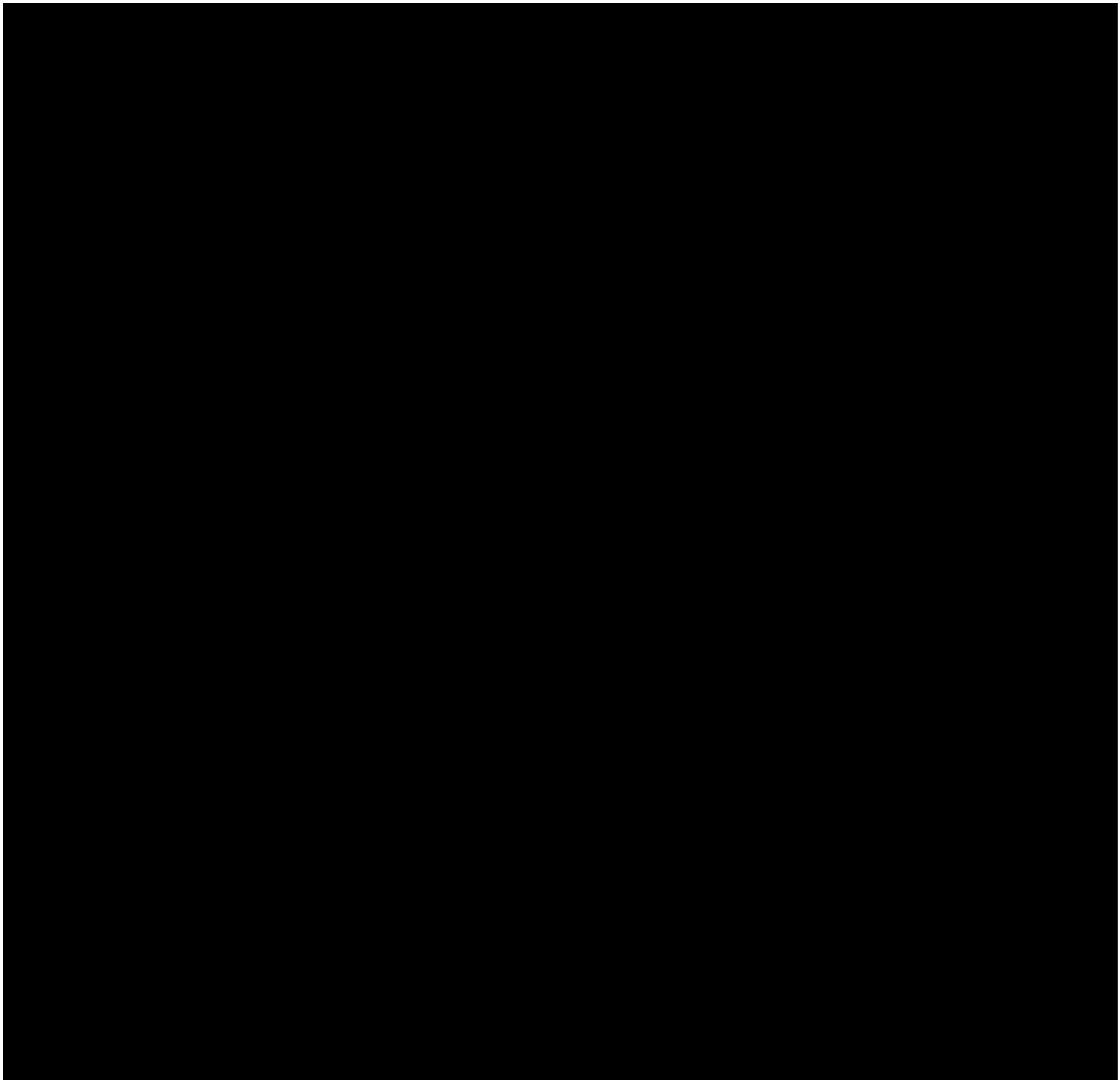


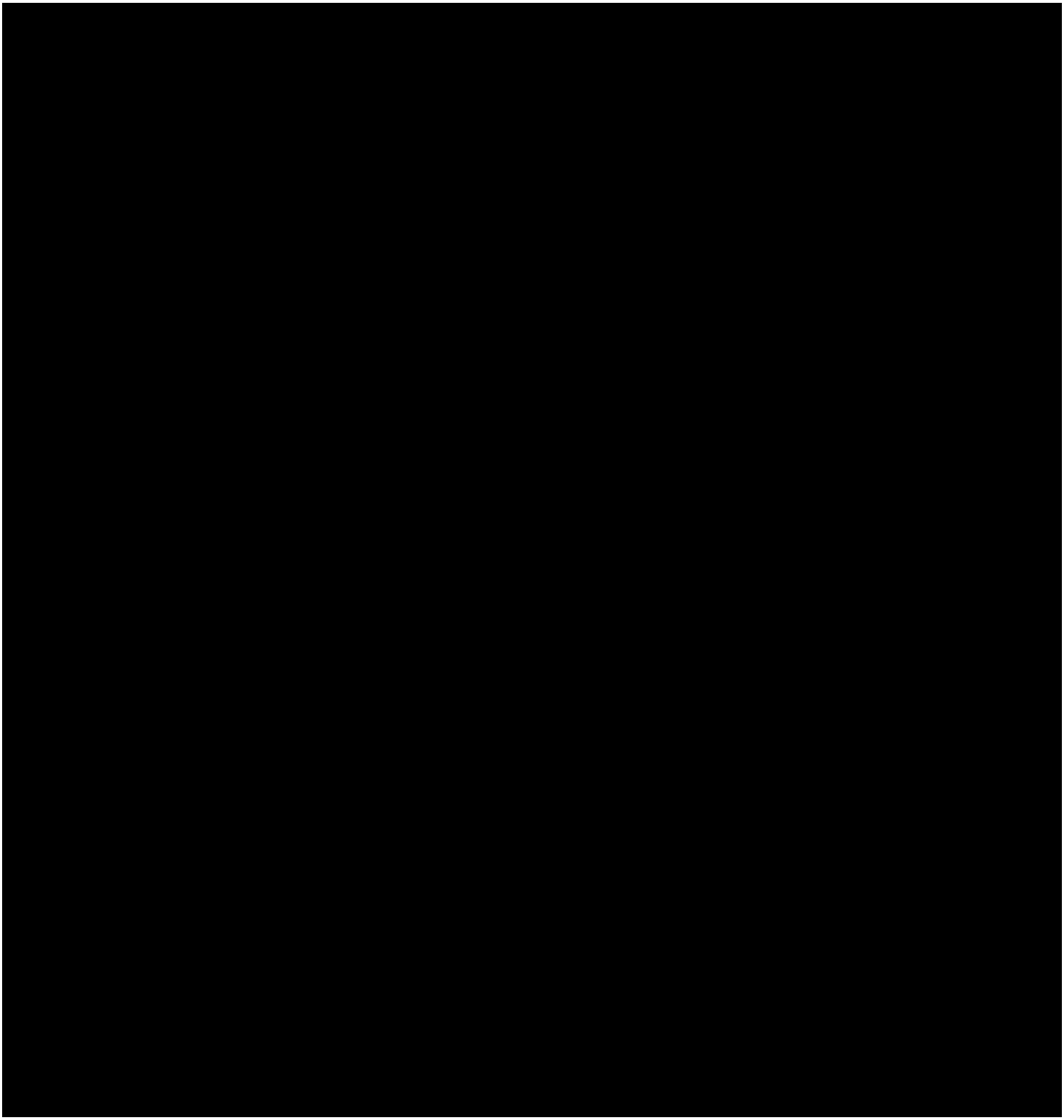


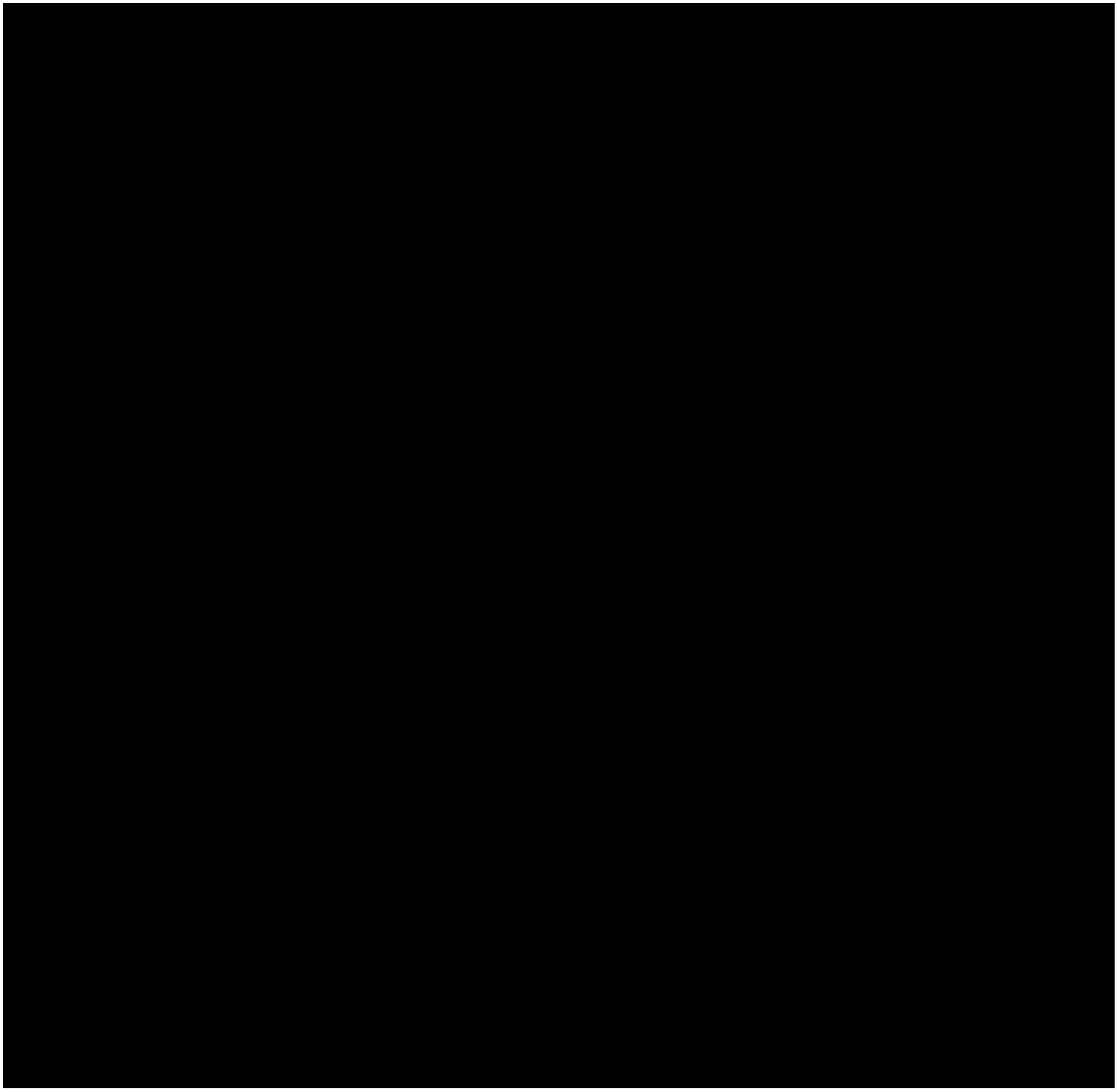


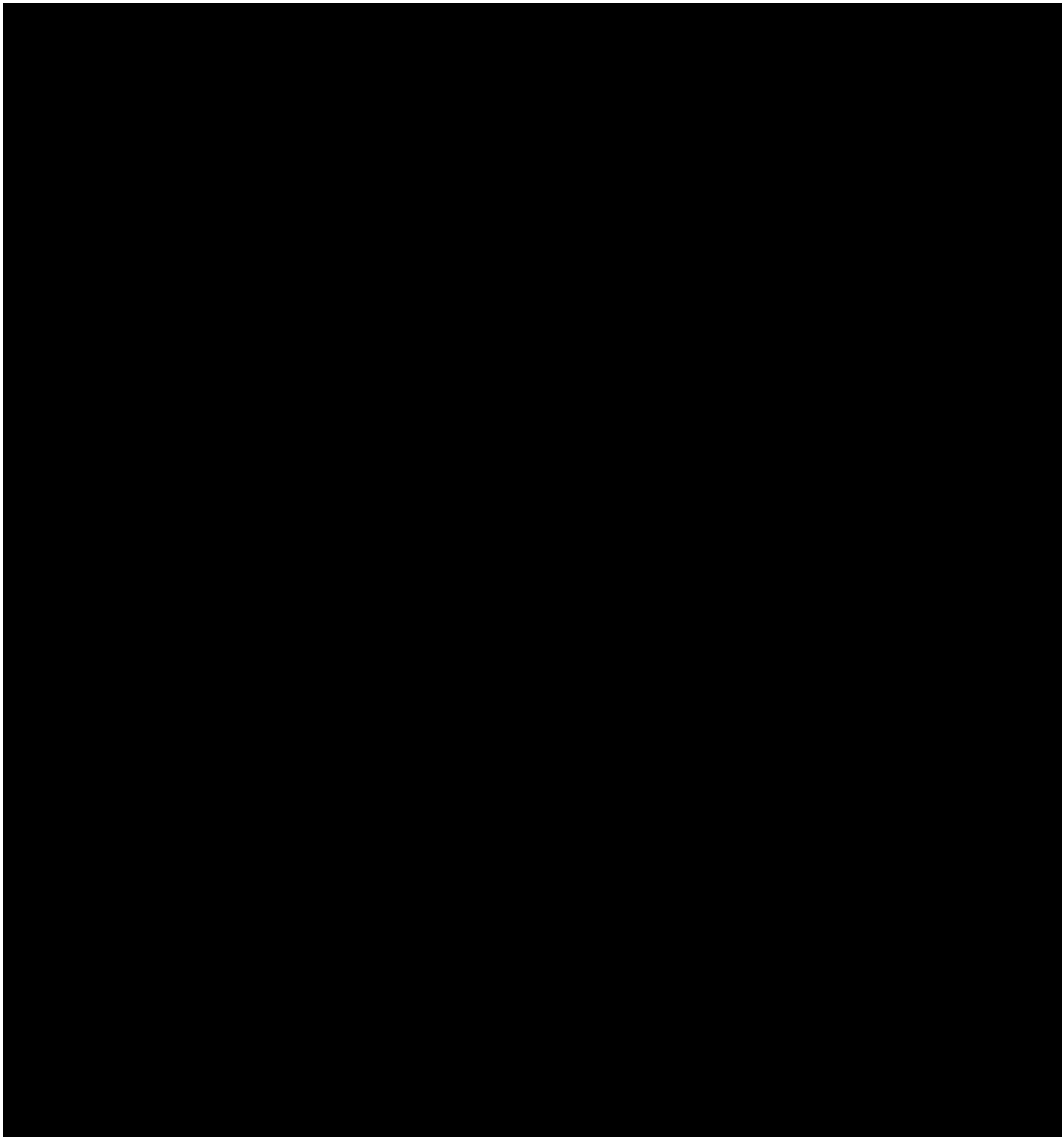


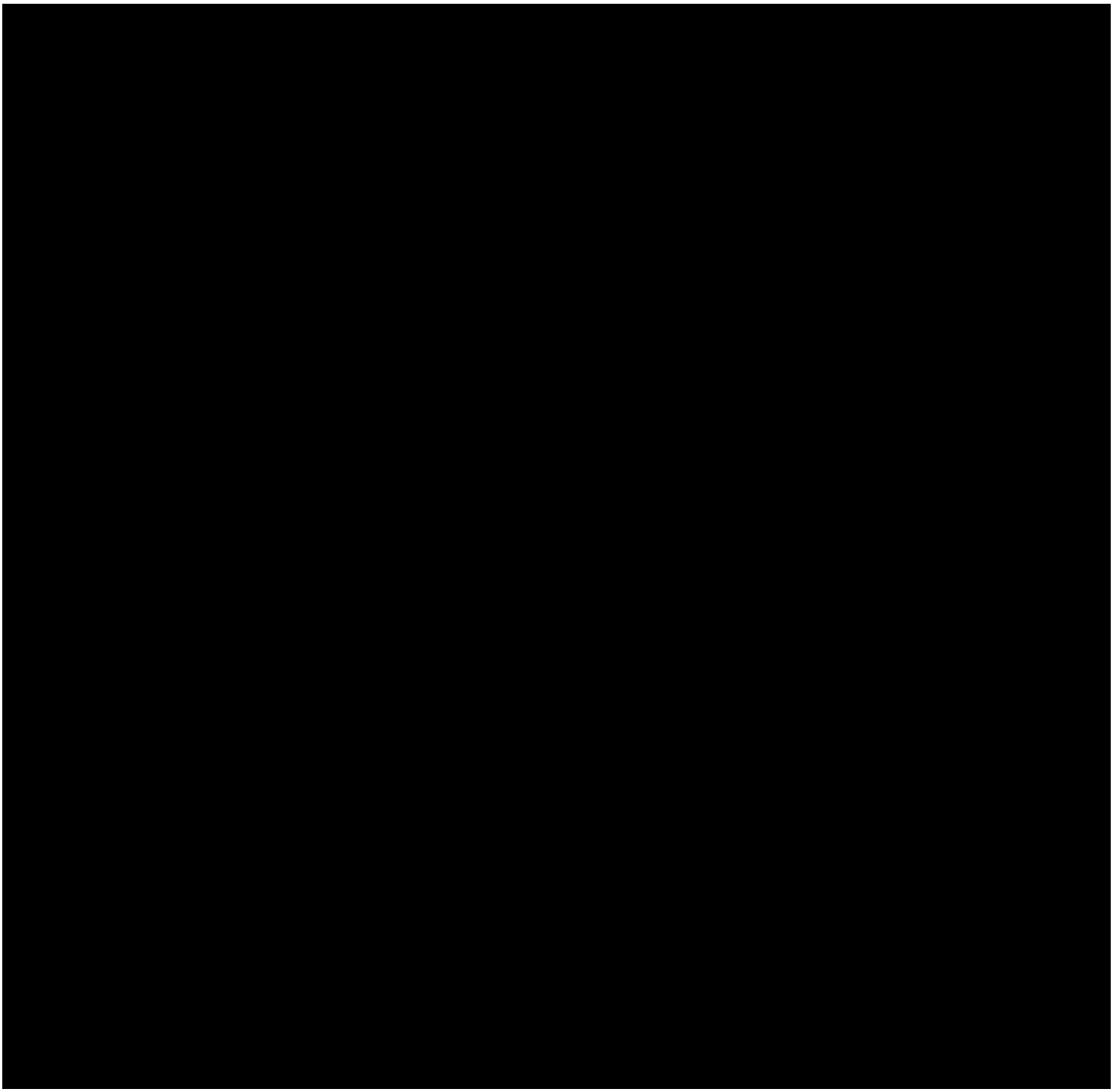












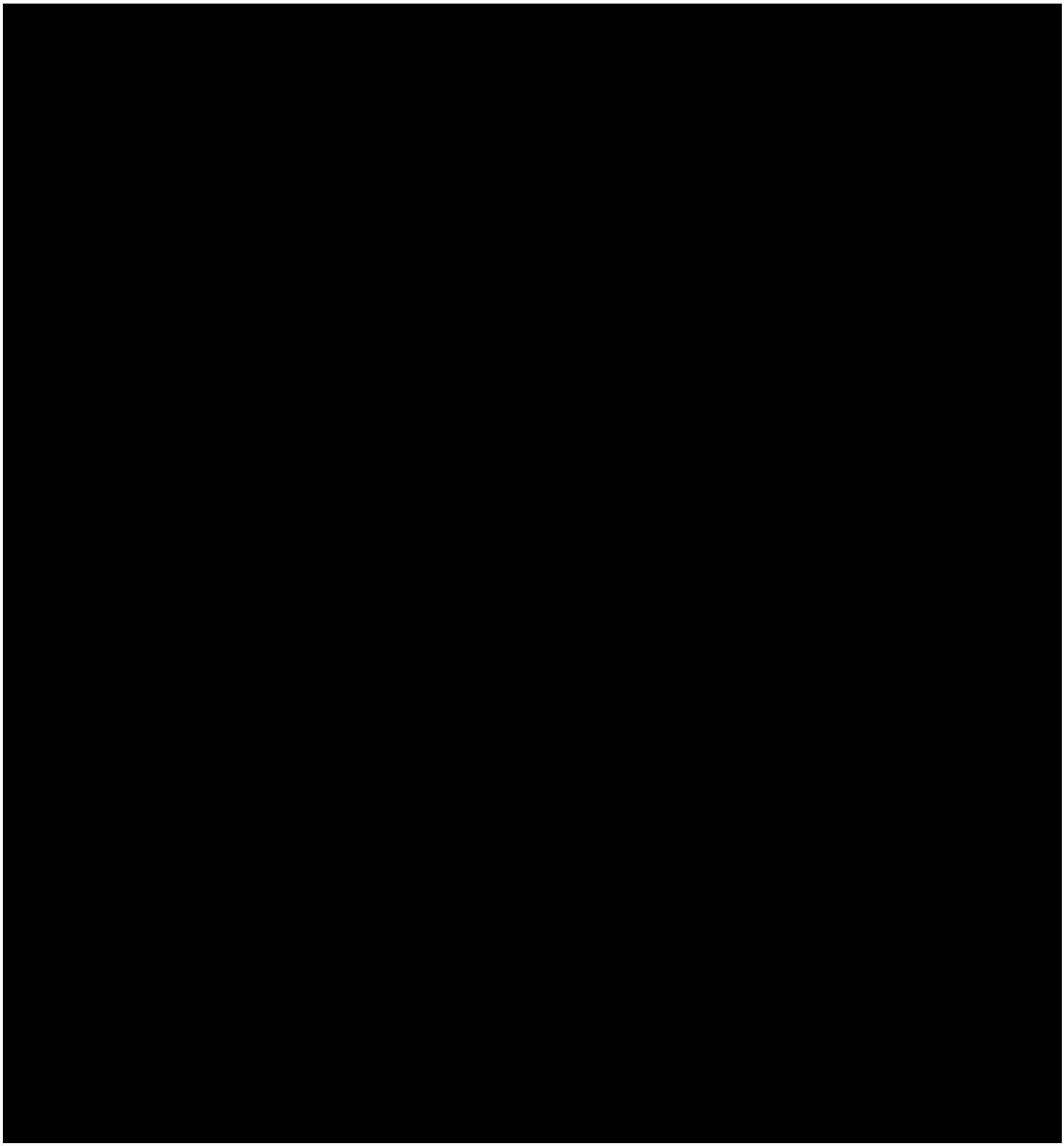


Exhibit 6

PUBLIC VERSION

FPL installs new poles to strengthen electric grid and help communities prepare for hurricane season

From Sarasota to Stuart, Miami to Merritt Island, you may not think much about the orange signs you see along Florida roadways warning of utility work ahead. However, if a hurricane strikes in the coming months, this seemingly insignificant work could help Florida Power & Light Company better serve its customers in these communities.

"FPL takes hurricane season very seriously and we prepare for it year-round," says Keith Hardy, FPL's vice president of Distribution. "We are investing $200 million this year to strengthen our electric grid, replace poles and improve reliable service. This is one of the ways we help prepare the communities we serve."

Following the unprecedented hurricane seasons of 2004-2005, FPL, under the guidance of the Florida Public Service Commission, embarked on a long-term infrastructure strengthening effort to help communities better respond to severe weather. The work improves FPL's service reliability throughout the year, but Hardy says its greatest value lies in its potential to help the utility restore power to customers faster after a storm strikes.

"We work closely with the governments, customers and first responders in the 35 counties we serve to identify critical infrastructure – facilities like hospitals, 911 centers, police and fire stations – places that provide for the health and safety of the public," says Hardy. "We worked to improve the infrastructure around these facilities first, as we know they provide essential services to our communities."

Since 2006, FPL has strengthened the electric grid serving many of the top critical facilities in the state, and is now expanding its efforts to include important thoroughfares – along with grocery stores, pharmacies and service stations – that can help communities return to "normalcy" faster. In these areas, FPL reinforces existing utility poles with stronger wood or concrete poles, some of which stand 55-feet tall and weigh more than 8,000 pounds. Stronger poles are expected to improve restoration time as setting new poles takes much more time than replacing downed wires.

"We have 280 residents and patients – and that's a lot of lives to be responsible for," says Carmen Shell, director of the Morse Geriatric Center in West Palm Beach, one of the critical care facilities FPL services. "Restoring power rapidly is the best thing that can happen because not everything works on a generator."

Hardy reminds customers that hurricanes are devastating forces of nature, and that in a serious storm there will be power outages, which could be lengthy. He encourages customers to develop plans accordingly.

"While no utility can be storm-proof," says Hardy, "FPL's ongoing investments in line strengthening and storm readiness are designed to help limit the impact of storms on the electric system and enable the utility to restore service to customers faster when outages do occur."

ATT01017